Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 79-461

WATERBURY URBAN RENEWAL AGENCY,
Petitioner

vs.

WATERBURY ACTION TO CONSERVE OUR HERITAGE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Waterbury Urban Renewal Agency hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered June 25, 1979, affirming the order of the United States District Court for the District of Connecticut entered December 22, 1978.

OPINIONS BELOW

The decision of the Court of Appeals dated June 25, 1979 (Appendix A) is not yet reported. The order of the District Court dated December 22, 1978 (Appendix B) is not yet reported.

JURISDICTION

The order of the Court of Appeals was entered on June 25, 1979.

This petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

WHETHER THE EXECUTION OF A LOAN AND CAPITAL GRANT CONTRACT FOR AN URBAN RENEWAL PROJECT CONSTITUTES A "CUT OFF" DATE AFTER WHICH COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT IS NOT REQUIRED, IF AT THE TIME OF THE EXECUTION OF THE LOAN AND CAPITAL GRANT CONTRACT THERE WERE NO DISTRICTS, SITES, BUILDINGS OR STRUCTURES INCLUDED IN THE NATIONAL REGISTER.

STATUTE INVOLVED

On May 11, 1973, the date of the execution of the Loan and Capital Grant Contract, Section 106 of the National Historic Preservation Act (16 U.S.C. § 470 (f)) read as follows:

> "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Sections 470(i) to 470(n) of this title a reasonable opportunity to comment with regard to such undertaking."

STATEMENT OF THE CASE

In October, 1978, a citizens group, Waterbury Action to Conserve Our Heritage, (hereinafter referred to as WATCH) brought an action in the Federal District Court for the District of Connecticut against Waterbury Urban Renewal Agency (hereinafter referred to as WURA) and the Department of Housing and Urban Development (hereinafter referred to as HUD) seeking an injunction to prevent WURA and HUD from continuing a downtown urban renewal project (R-107 Conn.) in the City of Waterbury on the grounds that HUD had not complied with the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA).

The City of Waterbury adopted the Urban Renewal Plan known as Central Business District Renewal Project (R-107) in 1971.

On May 11, 1973, WURA and HUD entered into a Loan and Capital Grant Contract, which contract provided for the funding and implementation of the R-107 Plan. The total cost for the Central Business District Renewal Project is approximately $17,000,000.00. Approximately $12,000,000.00 has been expended on said project, 56 buildings have been demolished and 27 buildings are scheduled for demolition.

At the time of the execution of the Loan and Capital Grant Contract, there were no buildings, districts or sites included in the National Register.

In its decision, the District Court ruled that the "cut off" date for determining compliance with the NHPA, in the context of urban renewal projects, is the date of execution by the parties of the Loan and Capital Grant Contract. However, the District Court enjoined the R-107 project on the grounds that HUD had failed to comply with NEPA.

WURA and WATCH appealed the decision of the District Court to the United States Court of Appeals for the Second Circuit.

The U.S. Court of Appeals for the Second Circuit affirmed the judgment of the District Court, but, contrary to the District Court's ruling, held that the signing of the Loan and Capital Grant Contract did not constitute a "cut off" date for compliance with Section 106 of the NHPA. The Court therefore, found that HUD did not comply with the NHPA and ordered the temporary injunction entered in the District Court made permanent.

REASON FOR GRANTING THE WRIT

(A) THE DECISION OF THE SECOND CIRCUIT IS DIRECTLY IN CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR THE TENTH CIRCUIT AND SIXTH CIRCUIT.

In the instant case, the Second Circuit has ruled that, within the context of an urban renewal project, the date of the execution of the Loan and Capital Grant Contract is not a "cut off" date for determining compliance with the NHPA procedures.

The Tenth Circuit and Sixth Circuit have previously ruled that the date of the execution of the Loan and Capital Grant Contract is a "cut off" date for determining compliance with Section 106 of the NHPA.

The Tenth Circuit in **HART vs. DENVER URBAN RENEWAL AGENCY**, 551 F2nd 1178, 1180, stated:

> "the use of that contract date as of the time at which this provision becomes effective has been established in other jurisdictions. The analysis in each appears sound. The language of the Act is clear, particularly when compared to the comparable sections of NEPA."(1)

---

[1] The Second Circuit admitted that "some [clues to its meaning] do suggest that even a preliminary authorization amounts to a "cut off" P. 3287.

In **SOUTH HILL NEIGHBORHOOD ASSOCIATION vs. ROMNEY**, 421 F 2nd 454 (1969), the Sixth Circuit also determined that the "cut off" date for compliance with the NHPA was the date of the signing of the Loan and Copital Grant Contract. The Sixth Circuit adopted and affirmed the decision of the District Court, which in part stated (2):

> "16 U.S.C. 470 (f) and the duty contained therein refers only to times when plans or amendments to plans are authorized and resulting Loan and Capital Grant Contracts are entered between HUD and local Urban Renewal Agencies. Any other construction of the statute would place too great a burden on the administrative process." Supra P. 462

It should be stressed that the Second Circuit acknowledged that its conclusion represented a sharp departure from decisions of other Courts, stating at P. 3287 of its opinion:

> "because our conclusion differs from that of most Courts that have addressed the question, our reasoning must be stated with care."

(B) THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The decision of the Second Circuit delays the consummation of a $17,000,000.00 urban renewal project in the center of downtown Waterbury. Consequently, the project is jeopardized due to an inability to attract developers and an inability to obtain financing. The economic viability of the City of Water-

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[2] The Second Circuit disagreed with the Court in **South Hill Neighborhood Association** when it stated at Page 3296, Footnote 30:

> "but we do not believe that this "construction of the statute would place too great a burden on the Urban Renewal Administrative Process" . . .

bury is adversely affected by the delay of the consummation of the urban renewal project. In addition, the decision may similarly affect urban renewal projects nationwide.

(C) THE SECOND CIRCUITS DECISION IS CLEARLY IN ERROR AND IN CONFLICT WITH THE OVERWHELMING WEIGHT OF AUTHORITY.

In addition to the cases cited supra, all reported cases, dealing with this specific issue, have held that after the execution of the Loan and Capital Grant Contract, HUD is not obligated to follow the procedures set forth in Section 106 of the National Historic Preservation Act.

KENT COUNTY COUNCIL FOR HISTORIC PRESERVATION vs. ROMNEY ,304 F. Supp. 885, 888 (W. D. Mich. 1969)

COMMITTEE TO SAVE THE SOUTH GREEN vs. HILLS, 7 Envt'l L. Rep. 20061

SAVE THE COURTHOUSE COMMITTEE vs. LYNN, 408 F. Supp. 1323, 1335-36 (S.D.N.Y. 1975)

ST. JOSEPH HISTORICAL SOC. vs. LAND CLEARANCE FOR REDEVELOPMENT AUTHORITY, 366 F. Supp. 605, 608-09 (W. D. MO. 1973)

WATCH vs. PATRICIA R. HARRIS, ET AL, Doc. #H 78-539 (D Conn 1978) (See Appendix B)

CONCLUSION

Petitioner respectfully submits that this petition should be granted for the following reasons:

1. The Second Circuit's decision is in conflict with other Circuits.

2. The Second Circuit's decision is in conflict with all other reported cases.

3. This case involves substantial funds.

4. The Second Circuit's decision will have a devastating effect on the Waterbury Urban Renewal Project, and may have a devastating effect on other urban renewal projects throughout the country.

Respectfully submitted,

JAMES E. HARTLEY, JR.
WILLIAM J. SECOR, JR.
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 858, 931—August Term, 1978.

(Argued March 19, 1979 Decided June 25, 1979.)

Docket Nos. 79-7030, 79-7100

WATCH (Waterbury Action to Conserve Our Heritage Incorporated),

Appellee-Cross Appellant,

—v.—

PATRICIA ROBERTS HARRIS, individually and as Secretary, United States Department of Housing and Urban Development; EDWARD T. MARTIN, Regional Administrator, Region 1, United States Department of Housing and Urba.. Development; LAWRENCE THOMPSON, Area Director, United States Department of Housing and Urban Development,

Appellees,

WATERBURY URBAN RENEWAL AGENCY,

Appellant-Cross Appellee.

Before:

LUMBARD and OAKES, *Circuit Judges*, and BRIEANT, *District Judge.**

* Of the Southern District of New York, sitting by designation.

Cross-appeals from a ruling of the United States District Court for the District of Connecticut, T. Emmet Clarie, *Chief Judge,* granting motion for a preliminary injunction against the United States Department of Housing and Urban Development and the Waterbury Urban Renewal Agency proceeding with an urban renewal project. Pursuant to the parties' stipulation that this appeal determine the merits, *cf.* Fed. R. Civ. P. 65(a)(2), *held*: defendants' conduct violated both the National Historic Preservation Act and the National Environmental Policy Act. Judgment affirmed; preliminary injunction directed to be made permanent.

JAMES E. HARTLEY, JR., SECOR, CASSIDY & MCPARTLAND, P.C., Waterbury, Connecticut, *for Appellant-Cross Appellee.*

WILLIAM J. SECOR, JR., SECOR, CASSIDY & MCPARTLAND, P.C., Waterbury, Connecticut, *for Appellant-Cross Appellee.*

WILLIAM HOWARD, SHAW & HOWARD, Middletown, Connecticut (John F. Shaw, Jr., on the brief), *for Appellee-Cross Appellant.*

JAMES W. MOORMAN, Assistant Attorney General; Richard Blumenthal, United States Attorney for the District of Connecticut; George J. Kelly, Jr., Assistant United States Attorney; Robert L. Klarquist, John J. Zimmerman, Attorneys, Department of Justice, Washington, D.C., *memorandum for the federal Appellees.*

OAKES, *Circuit Judge*:

An ongoing urban renewal project in the heart of a small New England city has evidently awakened in the minds and hearts of local citizens concern about the historical heritage that the project impinges upon. The citizens formed the plaintiff organization by the acronym WATCH, Waterbury Action to Conserve Our Heritage, Inc., and the organization brought suit against three individual federal officials, the Secretary, Regional Administrator, and Area Director of the United States Department of Housing and Urban Development, hereinafter collectively called HUD, and against the Waterbury Urban Renewal Agency (WURA), defendant below and appellant here. The Central Business District Renewal Project No. Conn. R-107 (the Project) contemplated the demolition of a number of buildings in a twenty-acre area. In seeking to stop that demolition WATCH below urged that defendants had not complied with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 et seq., and certain regulations of HUD and of the Advisory Council on Historic Preservation.[1]

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1 The HUD Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality 1390.1, 38 Fed. Reg. 19182, 19185 (1973), provides:

> Any HUD action or undertaking which has an effect on a property listed on, or nominated to, the National Register of Historic Places will require Special Environmental Clearance and must comply with section 106 of the National Historic Preservation Act of 1966 and implementing procedures.

As Judge Blumenfeld held in *Committee to Save the South Green v. Hills*, No. H-76-328 (D. Conn. Nov. 5, 1976), 7 Envt'l L. Rep. 20061, 20064, "implementing procedures" must refer to regulations promulgated by the Advisory Council on Historic Preservation under NHPA. After the phrase "implementing procedures," the HUD Handbook states "(see Appendix L)," and the Handbook further explains, 38 Fed.

In a careful and comprehensive opinion, the United States District Court for the District of Connecticut, T. Emmet

Reg. 19182 n.4 (1973), that Appendix L is the Advisory Council's Procedures for Compliance with NHPA § 106, published at 37 Fed. Reg. 24146 (1972).

These original Advisory Council regulations required consideration of the effect of an undertaking only on *listed* properties. But new regulations published on February 28, 1973, required consideration of "nominated" properties as well. Despite the reference in the HUD Handbook to Appendix L, which itself refers to the original guidelines, the Handbook probably intended to incorporate the revised 1973 guidelines, because the Handbook itself mentions "nominated" properties and postdates the 1973 guidelines.

As if this were not complicated enough, the Advisory Council revised its procedures yet again on January 25, 1974, to apply to "eligible" properties, 39 Fed. Reg. 3366. The procedures, which have not been revised again, are codified at 36 C.F.R. § 800. Although HUD proposed to incorporate the thus-revised procedures, 39 Fed. Reg. 6816, 6819, § 50.11g (Feb. 22, 1974), it apparently has not done so. It has, however, again proposed to adopt present Advisory Council procedures to "clarify" HUD's review requirements, 43 Fed. Reg. 35170, 35173 (1978).

It is important to note that Handbook 1390.1 originally incorporated the Advisory Council procedures pursuant not only to NHPA but also to NEPA and Executive Order 11593, 36 Fed. Reg. 8921 (1971), 1971 U.S. Code Cong. & Ad. News 2545, giving the Handbook somewhat broader authority than the district judge may have attributed to it. The legislative history of the 1976 NHPA amendments elucidates this point:

> With respect to the substantive work of the Council, Section 106 requires Federal agencies to provide the Council with a reasonable opportunity to comment on their undertakings that affect properties listed on the National Register of Historic Places. Since 1966, the National Environmental Policy Act of 1969 and Executive Order 11593 of 1971 have expanded the Council's review responsibilities, conducted pursuant to the Council's procedures (36 C.F.R. 800), to include properties that are eligible for inclusion in the National Register. Recognition of these existing responsibilities, by amendment of Section 106 to include "properties eligible for inclusion in the National Register," would clarify and support the Council's present project review activities.

The Status of the Advisory Council on Historic Preservation under the National Historic Preservation Act of 1966: Report of the Advisory Council on Historic Preservation to the Senate Committee on Interior and Insular Affairs, June 1975, in S. Rep. No. 94-367, 94th Cong., 2d Sess. 33, 1976 U.S. Code Cong. & Ad. News 2460-61.

Clarie, Chief Judge, held that NEPA was applicable but that, because the loan and capital grant contract was executed before any affected properties were listed in the National Register, NHPA was not. He also held that subsequent regulations of the Advisory Council on Historic Preservation, *supra* note 1, could not apply because they would be "inconsistent" with NHPA, the underlying statute. Accordingly, the court granted WATCH's motion for a preliminary injunction to restrain the defendants from proceeding with the Project.

WURA appeals from the grant of the preliminary injunction. In a cross-appeal and pursuant to our certification of the issue under 28 U.S.C. § 1292(b), WATCH urges that NHPA is applicable to the Project. HUD does not appeal the grant of the injunction but has filed a memorandum disputing WURA's arguments that NEPA does not apply or that if it does apply it conflicts with NHPA. The parties have now stipulated that the hearing before the district court on the preliminary injunction can be considered as a hearing on the merits. *Cf.* Fed. R. Civ. P. 65(a)(2). We commend counsel for this expediting and cost-saving agreement, which we assume that the district court will accept. Thus we need not discuss "probability of success," "irreparable injury," or other elements of the preliminary injunction test[2] but will proceed to the merits of the legal issues.

Background

The City of Waterbury, after workshop sessions, meetings, public hearings, and the like, adopted an urban renewal plan to rehabilitate an area of 20.6 acres in downtown

2 As we understand it, the stipulation removes all such questions from the case. We note, however, that the district judge was surely correct in finding irreparable injury; demolition is generally irreparable.

Waterbury north of Interstate 84. On May 11, 1973, WURA and HUD executed a Loan and Capital Grant Contract (the Contract), pursuant to which HUD was to give WURA project loans aggregating in excess of $12,800,000 and a capital grant in excess of $11,500,000. The plan calls for demolition of 83 of some 113 buildings in the project area and for the construction of high rise, high density commercial and office space. The project is still far from completion. As of January 28, 1977, 55% of the land had been acquired; 35% of the buildings had been demolished; although no land had been disposed of, project improvements were 25% complete; and relocation was 45% complete.[3] As of November 28, 1978, 27 of the buildings scheduled for demolition remained standing. WURA's executive director testified that as of November 1978, WURA had spent only $12 million of the total cost of the project; that WURA has not disposed of or agreed to convey some of the real estate on which the remaining buildings scheduled for demolition sit; that WURA has not even acquired certain property from private owners; and that a number of the remaining buildings scheduled for demolition are occupied by tenants of WURA.

It is of some importance to the resolution of this case that under the Contract the work is done in phases, each of which requires HUD's permission. Under Section 108 (A) of the Contract, WURA is required promptly to submit to HUD documentary data with respect to any action that WURA proposes to take in carrying out the Project. Section 108(B) further provides:

> [HUD] may elect not to make a requested payment . . . if, after [WURA] shall have furnished any item

3 The district court noted that there is some slight dispute about these figures but that the dispute is irrelevant to the merits. *WATCH v. Harris*, No. H-78-539 (D. Conn. Dec. 22, 1978), at 4 n.1.

> covered by and in accordance with Section 108(A) hereof, [WURA] shall have proceeded further with respect thereto without having been advised in writing by the Secretary to the effect that [HUD] has no objection to [WURA's] so proceeding.

Thus the acquisition of properties, the demolition of buildings, and changes in the urban renewal plan all require HUD's on-going permission. Section 108(B) explains that this permission is necessary to insure that the "Agency [WURA] shall not take any step which might, in the opinion of the Secretary [of HUD], violate applicable Federal laws or regulations . . . "[4]

4 Section 108 of the Contract provides in full:

> (A) Types of Project Data to Be Furnished.—The Local Public Agency will promptly furnish the Secretary with such copies as he may reasonably require, for his use under this Contract, of the following items covering actions then proposed to be taken by the Local Public Agency in its carrying out of, and which pertain to, the Project:
>
> (1) Documentary data covering salary rate determinations made under State or local law with respect to architects, technical engineers, draftsmen, and technicians to be employed in the development of the Project;
>
> (2) Contract documents covering contracts of each type it proposes to enter into or upon which it proposes to seek bids or proposals;
>
> (3) Tabulations of bids or proposals it receives on contracts for which it seeks bids or proposals;
>
> (4) Documentary data covering its proposed awards of contracts;
>
> (5) Contract change orders and contract novations which it proposes to issue, and proposed contract assignments which it proposes to approve;
>
> (6) Documentary data covering its proposed determinations respecting liquidated damages and extensions of time under its awarded contracts;
>
> (7) Documentary data covering any Project work it proposes to undertake by so-called "force account";
>
> (8) Reports of appraisals which are made at its instance with respect to land in the Urban Renewal Area to be acquired by it as

In the eyes of WATCH, the buildings in the project area possess historical interest because they are "of a classic

a part of the Project, and similar reports with respect to Project Land to be disposed of by it;

(9) Documentary data covering its proposed acquisitions of options to acquire land in the Urban Renewal Area as a part of the Project except where the option is for a nominal consideration and the land purchase price stated in the proposed option does not exceed the purchase price of such land, as theretofore concurred in by the Secretary;

(10) Documentary data covering its proposed granting of options to others to acquire Project Land;

(11) Proposed contract documents by which it proposes to contract to acquire land in the Urban Renewal Area as a part of the Project or proposes to contract to dispose of Project Land;

(12) Documentary data covering its proposed acquisitions of land in the Urban Renewal Area as a part of the Project and covering its proposed dispositions and retentions of Project Land;

(13) Documentary data covering its proposed determinations of fair value of Project Land to be disposed of by it;

(14) Documentary data supporting the capital values it proposes to impute to Project Land to be leased by it to others or to be retained by it for use in accordance with the Urban Renewal Plan;

(15) Documentary data covering its proposed arrangements respecting its temporary operation, utilization, or disposition of Project Land pending its preparation and ultimate sale, lease, or retention of Project Land for uses in accordance with the Urban Renewal Plan;

(16) Documentary data covering its proposed clearance of buildings and structures from the Urban Renewal Area and covering its proposed utilization or disposition of such buildings and structures;

(17) Documentary data covering any proposed changes in the Project, the Urban Renewal Area, the Urban Renewal Plan, or the Relocation Plans;

(18) The proceedings which, from time to time, it proposes to take for the authorization, execution, issuance, and delivery of any Project Temporary Loan Obligations, Preliminary Loan Obligations, Project Definitive Loan Obligations, or Project Loan Payment Obligations; and

(19) Other documentary data, not hereinbefore mentioned in this subsection, covering any proposed actions of the Local Public Agency pertaining to the Project.

(B) Advice by Secretary to Local Public Agency Concerning Certain Proposed Actions by Latter.—Notwithstanding any other provisions of this Contract, the Government may elect not to make a

turn-of-the-century main street type," representing an eclectic collection of architectural styles including Renaissance revival, Richardsonian romanesque, Greek revival, and Italianate. The cultural, social, architectural, and historic significance of the neighborhood escaped the attention of the local citizenry—at least they were not moved by the writings of Ada Louise Huxtable—until December 1, 1976,[5]

requested payment on account of the Project Temporary Loan, any Project Definitive Loan, or the Project Capital Grant if, after the Local Public Agency shall have furnished any item covered by and in accordance with Section 108(A) hereof, the Local Public Agency shall have proceeded further with respect thereto without having been advised in writing by the Secretary to the effect that the Government has no objection to the Local Public Agency so proceeding (it being the purpose of this subsection, and of Section 108(A) hereof, to insure that the Local Public Agency shall not take any step which might, in the opinion of the Secretary, violate applicable Federal laws or regulations or provisions of this Contract, and to minimize thereby the possibility of violations which might render it impossible for the Government to make the Project Temporary Loan or any Project Definitive Loan or to pay the Project Capital Grant, as the case may be, or which might result in unnecessary and ineligible costs or unnecessary delays with respect to the Project).

5 This is not surprising. As indicated in the legislative history of the 1976 Amendments to NHPA,

> One result of the current funding situation is that the backlog of work to be done in identifying and preserving properties will continue to increase. If the program is left unchanged, in a few years such massive funding may be required to eliminate the backlog that it may not be possible to reach a state of parity with the needs. This would be a crucial problem because the current preservation movement has shifted from the preservation of nationally significant sites pursuant to the Historic Sites Act of 1935 and the preservation of individual sites of State or local importance under the 1966 Act to the conservation of basic elements of the human environment. This is particularly true in urban areas. *Entire neighborhoods are now* [1975] *the focus for preservation, although they would not have met the older tests of outstanding historical or architectural merit.* Areas of cultural significance, such as Chinatown in Honolulu, or Beale Street in Memphis, benefit from the present Federal preservation programs. In this manner, *preservation becomes more relevant to a broader segment of American society and local enthusiasm for*

when the Waterbury Commission on Aging suggested to the State Historic Preservation office that the H. H. Peck carriage house, located within the Project area, be considered for listing on the National Register of historic places.[6] When on May 6, 1976, WURA forwarded to HUD's area office HUD Form ECO-1 setting forth the applicant's environmental information with respect to the project area, WURA stated that "[t]here are no known significant historic, archaelogical, or architectural sites or properties listed on, or being considered for nomination to, the National Register of Historic Places." Similarly there were no responses to HUD's legal advertisements on January 5, 1977, in two Waterbury newspapers that HUD was performing an environmental assessment of the Project and was inviting comment by January 20.

On January 28, 1977, HUD completed its Special Environmental Clearance for the Project, observing that "[t]here are no properties listed or nominated to the National Register of historical places." Based on this Clear-

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the program continues to increase. Federal participation should keep pace with this expanding base of support.

Title II of S. 327: A Report of the Advisory Council on Historic Preservation to the Senate Committee on Interior and Insular Affairs, June, 1975, in S. Rep. No. 94-367, 94th Cong., 2d Sess. 28, 1976 U.S. Code Cong. & Ad. News 2456 (emphasis supplied).

6 The State's belated consideration of the carriage house is also not surprising, for interest in local historic preservation has become widespread only in recent years, and state historic preservation offices have been underfunded and understaffed. *See* S. Rep. No. 94-367, *supra* note 1, at 6-7, 1976 U.S. Code Cong. & Ad. News 2444-45; and Advisory Council Report, *supra* note 5, in S. Rep. No. 367, *supra* note 1, at 27, 1976 U.S. Code Cong. & Ad. News 2455-56 ("The National Register only lists about 10,000 properties at this time [1975] out of an estimated total in excess of 50,000 when the Register is complete. The major cause of this lag is lack of funds . . . . Given limited funds, the States have had to use most of their monies for 'bricks and mortar' preservation of already inventoried properties in imminent danger of loss.").

ance, HUD concluded that there was no significant environmental impact and that the processing of the Project could proceed. But HUD did not consult with the State Historic Preservation office (SHPO) about eligible properties before preparing the Clearance, and there was disputed testimony that it also did not consult about listed or nominated properties. Neither the ECO-1 nor the Clearance expressly considered alternatives to demolition of buildings designated for demolition in the Project area. HUD did not prepare an environmental impact statement for the Project area and did not consult with the national Advisory Council on Historic Preservation.

However, on April 21, 1977, WURA did transmit information to HUD about the potential eligibility of the carriage house. On December 29, 1977, HUD wrote to the Department of Interior and expressed its finding that the house was not eligible but requested a determination from the Department. The Keeper of the National Register determined that the house was eligible on February 7, 1978. In late December, 1977, attorneys for members of WATCH who owned property in the Project area wrote to HUD demanding National Register eligibility determinations with respect to all the commercial buildings in the Project area. On January 18, 1978, HUD ordered a "freeze," *i.e.*, that no federally assisted acquisition, disposition, renovation, or demolition be conducted on any structure within the Project area until the area office had made a Register eligibility determination. The Advisory Council on Historic Preservation subsequently informed the HUD area office that it had become aware of the Project and requested an evaluation of the significance of the central business district. The State Historic Preservation officer on March 22, 1978, also wrote to the HUD area office stating that he had made a field inspection in February and

concluding that several portions of the area were eligible for inclusion, because the area was "a substantially intact 19th century commercial district," one of the more complete 19th century downtown areas in Connecticut, and some of the buildings were "outstanding examples of their types."

The "freeze" lasted from January 18, 1978, to August 31, 1978, while HUD inspected the project and gathered data. In September, 1978, HUD terminated its attempts to obtain Register eligibility determinations and recommenced demolition. At this point SHPO informed the Deputy Assistant Secretary of HUD that it had not been consulted and suggested an immediate review of HUD's decision not to seek an eligibility determination. WURA has evidently entered into a contract for the demolition of the remaining buildings scheduled for demolition. WATCH brought suit in October, 1978, and the district court granted a preliminary injunction on December 22, 1978.

The Decision of the Court Below and Contentions of the Parties

The district court held that the plaintiff WATCH had standing to sue, a decision which is not challenged on the appeal, and that the plaintiffs were not guilty of laches because the buildings about which they were concerned had not yet been demolished and because the plaintiffs could properly rely upon the federal agencies' performing their statutory duties. This decision was surely correct in view of the public interest in preserving the historic sites that remain and the continuing nature of HUD's supervision over acquisition, demolition, and other project activities, *see* note 4 *supra*. *Compare Steubing v. Brinegar*, 511 F.2d 489, 495 (2d Cir. 1975), *with City of Rochester v. United*

States Postal Service, 541 F.2d 967, 977 (2d Cir. 1976). On the merits, Judge Clarie held that NHPA was inapplicable, that Advisory Council and HUD regulations, *see* note 1 *supra*, were either inapplicable or invalid, but that NEPA did apply.

Judge Clarie concluded that NHPA was inapplicable because in 1973, when the contract here was executed, Section 106, 16 U.S.C. § 480f, provided that "[t]he head of any Federal agency . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any district, site, building, structure or object that is included in the National Register."[7] Although the statue was amended in 1976 to refer to property "including in *or eligible for inclusion in* the National Register" (emphasis added), the language "prior to the approval of the expenditure of any Federal funds" remained. As Judge Clarie duly noted, a number of federal courts, in reviewing NHPA challenges to federally assisted urban renewal projects, have interpreted the "approval" language to mean the time when a grant and loan contract is executed.[8] Because no properties

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7 Prior to 1976, § 106 provided in full:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470n of this title a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f (1970).

8 The principal cases are *South Hill Neighborhood Ass'n v. Romney*, 421 F.2d 454, 462 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970);

in the Project area were listed when the Contract was signed, Judge Clarie reasoned, NHPA imposes no present duty upon HUD to consider the effect of the Project on eligible properties or properties listed after 1973.

The court next addressed the applicability of HUD regulations. Pursuant to Executive Order 11593, 36 Fed. Reg. 8921 (1971), directing federal agencies to adopt procedures to assure that federal programs contribute to historic preservation, HUD incorporated by reference the guidelines which the Advisory Council on Historic Preservation had promulgated. *See* note 1 *supra*. Under the authority of NHPA, these guidelines originally established procedures for determining whether a federally assisted undertaking

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and *Kent County Council for Historic Preservation v. Romney*, 304 F. Supp. 885, 888 (W.D. Mich. 1969). Subsequent cases invoking what may be called the "cut-off" principle have simply followed these cases. *Hart v. Denver Urban Renewal Auth.*, 551 F.2d 1178, 1180 (10th Cir. 1977); *Committee to Save the South Green v. Hills*, *supra*, 7 Envt'l L. Rep. at 20064; *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323, 1335-36 (S.D.N.Y. 1975); *St. Joseph Historical Soc. v. Land Clearance for Redevelopment Auth.*, 366 F. Supp. 605, 608-09 (W.D. Mo. 1973).

Kent County appears to be the source of the "cut-off" principle. Responding to plaintiff's contention that each expenditure of federal funds invokes the protections of § 106, the judge noted that "prior to the expenditure" and "prior to approval of the expenditure" (the statutory language) reflect "two separate and distinct concepts." 304 F. Supp. at 888. The judge then used the rather strong language: "This Court would have to be mad to place such a ludicrous interpretation on the simple clear language employed by Congress in § 470f." *Id.* We suggest, however, that although each new *expenditure* of federal funds does not bring § 106 into play, each new *approval* of a phase of a plan might, if (as here) HUD's approval is necessary before federal funds may be expended on that portion of the plan. None of the other cases discusses, let alone makes, this distinction; evidently none of the parties argued the specific point. (Some of the cases have conceded, however, that if an *amendment* to the general urban renewal plan increases the commitment of federal funds, a new "approval" has occurred within the meaning of § 106. *Hart v. Denver Urban Renewal Auth.*, *supra*; *South Hill Neighborhood Ass'n*, *supra*; *Save the Courthouse Comm.*, *supra*.

had an effect on a listed property. 38 Fed. Reg. 5388 (1973). Under the authority of Executive Order 11593 and NEPA as well as NHPA, the Advisory Council revised the regulations effective January 25, 1974. 39 Fed. Reg. 3366. The guidelines, which have not been subsequently amended, are published at 36 C.F.R. § 800.

The district court noted that these revised guidelines

> differ from NHPA in two important respects. First, even prior to the 1976 amendment to § 470f, the Guidelines directed that the federal agency consider the effect of any proposed undertaking on properties "that are included in *or eligible for inclusion* in the National Register." 36 C.F.R. § 800.4 (emphasis supplied). Second, the Guidelines mandate continuing compliance with the Act, even after the date of signing the Loan and Capital Grant Contract, as long as the federal agency retains any authority to make changes in the project which could alter its impact on historical and cultural properties. 36 C.F.R. § 800.3(c) and (g).[9]

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9 36 C.F.R. § 800.3 provides:

> As used in these procedures:
>
> . . . .
>
> (c) "Undertaking" means any Federal action, activity, or program, or the approval, sanction, assistance, or support of any other action, activity or program, including but not limited to:
>
> . . . .
>
> (2) New and continuing projects and program activities: directly undertaken by Federal agencies; or supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance; or involving a Federal lease, permit, license, certificate, or other entitlement for use.
>
> . . . .
>
> (g) "Decision" means the exercise of agency authority at any stage of an undertaking where alterations might be made in the undertaking to modify its impact upon historic and cultural properties.

The importance of this last definition is apparent from 36 C.F.R. § 800.4(a):

WATCH v. Harris, No. H-78-539 (D. Conn. Dec. 22, 1978), at 13. But the court concluded that these guidelines were inapplicable, noting that they did not require agencies to consider eligible properties until 1974, when the contract had already been executed. The court further stated that the guidelines, even if applicable, were invalid because they exceeded the scope of NHPA.

Judge Clarie went on to find, however, that NEPA did apply. He reasoned that the granting of approval for acquisition or demolition of any property was a "major federal action" within the meaning of 42 U.S.C. § 4332[10] and pointed out that the courts[11] have construed this language and that of 42 U.S.C. § 4331(b)[12] to mean that a

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Identification of resources. As early as possible and in all cases prior to agency decision concerning an undertaking, the Agency Official shall identify properties located within the area of the undertaking's potential environmental impact that are included in or eligible for inclusion in the National Register.

10 42 U.S.C. § 4332(2) provides in pertinent part:

(2) all agencies of the Federal Government shall—

. . . .

(c) include in every recommendation or report on proposals for legislation or other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

. . . .

(iii) alternatives to the proposed action,

. . . .

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. . . .

11 *Jones v. Lynn*, 477 F.2d 885, 889 (1st Cir. 1973); *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 699 (2d Cir. 1972); *Save the Courthouse Comm., supra*, 408 F. Supp. at 1340.

12 Section 101(b) of NEPA, 42 U.S.C. § 4331(b), provides in part:

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all

federal agency must comply with NEPA so long as it retains, as HUD did here, significant control over the project. The judge noted that HUD recognized its continuing responsibility when it imposed a "freeze" on the Project. He found that once new information (the potential eligibility of several structures for listing) was made available, HUD should have conducted a new "threshold" determination as to whether an environmental impact statement was required. If as a result of this threshold determination HUD had decided that Register-eligible properties would be affected, then a detailed environmental impact statement would be required under the case law. The judge also referred to the necessity for notice and public comment prior to the determination under this court's decision in *Hanly v. Kleindienst*, 471 F.2d 823, 836 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), and to this court's requirement that the agency give sound reasons for any determination that structures are not in fact Register-eligible or will not be adversely affected. *City of Rochester v. United States Postal Service, supra*, 541 F.2d at 973.

WATCH seeks to uphold the district court decision in respect to NEPA but contends in respect to NHPA that the cases construing Section 106 to call for a cut-off date as of the date of the loan and capital grant agreement, note 8 *supra*, have been erroneously decided. In the view of WATCH, Section 106 "applies to require Advisory Council review as long as HUD retains the control to make approvals pursuant to the grant-loan Contract." WATCH

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practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

. . . .

(4) preserve important historic, cultural, and natural aspects of our national heritage . . . .

also argues that the guidelines of the Advisory Council do apply because they are procedural, irrespective of any construction of the Act itself; because they were promulgated before HUD made its environmental assessment in 1977;[13] and because the Handbook was adopted pursuant to NEPA and Executive Order 11593 as well as NHPA.

In this appeal, WURA makes an argument that it could not have made in the district court.[14] According to WURA, the district judge was clearly correct in construing NHPA to have an arbitrary cut-off date as of the time the contract was executed and in stating that the procedures of the Advisory Council, whether or not adopted by HUD, note 1 *supra,* could not affect this statutory interpretation. But, WURA argues, if NHPA is inapplicable, NEPA must also be inapplicable, for several reasons. First, notwithstanding the specific language in Section 101(b) of NEPA, *supra* note 12, WURA asserts that NHPA is the only federal statute applicable to historic preservation. Second, WURA relies upon a series of cases involving the air and water pollution acts and stating that where an act is the "functional equivalent" of NEPA, NEPA is not applicable.[15] Third, WURA argues that if an environmental impact statement is required, NEPA is in conflict with NHPA

13 A mechanical difficulty with this argument is that HUD has not adopted the "eligibility" provisions of the Advisory Council Procedures in its Handbook 1390.1 as of the time this case was heard below, perhaps through oversight or because HUD considered adoption unnecessary in light of the 1976 amendments to NHPA.

14 Ordinarily, of course, we will not consider arguments not made in the court below. *Terkildsen v. Waters,* 481 F.2d 201, 204-05 (2d Cir. 1973).

15 *E.g., Environmental Defense Fund, Inc. v. EPA,* 489 F.2d 1247, 1257 (D.C. Cir. 1973); *Portland Cement Ass'n v. Ruckelshaus,* 486 F.2d 375, 384 (D.C. Cir. 1973), *cert. denied,* 417 U.S. 921 (1974); *International Harvester Co. v. Ruckelshaus,* 478 F.2d 615, 650 n.130 (D.C. Cir. 1973).

and thus should not be enforced, under the Supreme Court decision in *Flint Ridge Development Co. v. Scenic Rivers Association,* 426 U.S. 776 (1976) (holding that the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, displaces NEPA where they are in direct conflict).[16]

WURA also argues that even if NEPA applies, HUD followed its own regulations; thus HUD's determination that an environmental impact statement did not have to be prepared was not arbitrary, capricious, or otherwise not in accordance with law.

On this appeal HUD now takes a position contrary to WURA, arguing that Congress has incorporated considerations of historic preservation into NEPA,[17] that NHPA is not the functional equivalent of NEPA,[18] and finally that there is no irreconcilable conflict between NHPA and NEPA that would justify exempting from the operation of Section 102(2)(C) of NEPA an urban renewal project which might have a significant effect on historic resources.

16 Under the Interstate Land Sales Full Disclosure Act, a real estate developer is required to file a disclosure statement with HUD, and HUD must permit the statement to become effective unless it disapproves of it within 30 days. 15 U.S.C. §§ 1704, 1706(a). HUD could not possibly comply with the latter requirement if it also had to file a NEPA environmental impact statement before allowing the statement to go into effect. Therefore, the Court held, because there was a "clear and unavoidable conflict . . ., NEPA must give way." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n,* 426 U.S. 776, 788 (1976). *See also United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 694 (1973) ("NEPA was not intended to repeal by implication any other statute").

17 *See* note 12 *supra.*

18 The Government reasons that the "functional equivalence" doctrine has been applied only to EPA activities under pollution control laws where the agency's objective was to explore environmental factors that included those enumerated in NEPA; that NHPA is not a "functional equivalent" of NEPA; and that even if it were, the doctrine cannot be invoked here because NHPA's provisions do not apply and thus do not offer any "protection," equivalent or otherwise.

DISCUSSION

We take up the NHPA question first because if WATCH is correct that NHPA has been erroneously construed, both the supposed conflict that the court found between the statute and regulations and the supposed conflict that WURA urges between NHPA and NEPA disappear. We do this in recognition of the principle of statutory construction that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

A. *NHPA*

Whether NHPA § 106, 16 U.S.C. § 470f, is applicable here depends upon whether the court below was correct in holding that the execution of the loan and grant contract was, within the meaning of the statute, "the approval of the expenditure of any federal funds on the undertaking . . . ." and the *only* such approval. If it were, then the "cut-off" date for compliance with NHPA was the time of the execution of the loan and grant contract; and because no properties were nominated to, or even considered eligible for listing on, much less listed on, the National Register as of that date, NHPA would clearly not apply. But one might distinguish between a contract that upon execution constitutes final approval of all expenditures of federal funds and a contract such as the one involved here that provides for subsequent approval in stages or phases of specific expenditures which the initial contract has only preliminarily authorized. Without much discussion, the decided cases appear to have assumed that in either kind of contract the cut-off date is the time of execution. *See* note 8 *supra*. We conclude, however, that the provisions of NHPA do

not cease to apply simply because an agency has preliminarily approved expenditures. Those provisions should apply until the agency has finally approved the expenditure of funds at each stage of the undertaking. Because our conclusion differs from that of most courts that have addressed the question, our reasoning must be stated with care.

We begin with the language of the statute. The clues to its meaning, unfortunately, are few and ambiguous. Some do suggest that even a preliminary authorization amounts to a cut-off. Thus the first sentence of § 106 states that a federal agency having jurisdiction over a "*proposed* Federal or federally assisted undertaking" (emphasis added) shall consider its effect on listed properties. And the language "any" in the phrase "prior to the approval of the expenditure of any Federal funds" might refer to the initial funding only. On the other hand, the language also supports the interpretation that the preliminary approval is not a cut-off. The term "proposed" might simply be shorthand for "proposed or continuing," and "any" might mean any expenditure of federal funds, not the expenditure of initial funds. Moreover, if the statute intended to establish a cut-off once an agency gave preliminary approval to expenditures, one might expect it to read "prior to the approval of the undertaking," rather than "prior to the approval of the expenditure of any Federal funds on the undertaking." [19] Finally, it is possible to interpret the term

19 One indication that Congress understands the distinction between approving an undertaking and approving expenditures on an undertaking is that Congress clearly provided for the former type of approval in the Department of Transportation Act of 1966:

> [T]he Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by

"undertaking" as referring not simply to an urban renewal project but to each of the project's several phases.[20]

Because we believe that the words of the statute are susceptible to either reading, we must look to other guides to ascertain the true congressional intent. In doing so, we must be cognizant of the principle that although legislative history may serve as a guide to the actual purpose of Congress in enacting a law, it is that purpose which we must keep uppermost in mind.[21]

Congress never explicitly considered the specific problem before us, so far as the recorded legislative history of the initial National Historic Preservation Act, Pub. L. No. 89-665, Title I, 80 Stat. 915 (1966), and the 1976 amendments thereto, Act of Sept. 28, 1976, Pub. L. No. 94-422, Title II, 90 Stat. 1320, disclose. Nevertheless the legislative history does shed light on the underlying problems that Congress attempted to meet and its method of meeting them; the history therefore helps "to manifest [congressional] purposes in their completeness . . . ." [22]

Congressional interest in historic preservation has been longstanding. H.R. Rep. No. 1916, 89th Cong., 2d Sess., 1966 U.S. Code Cong. & Ad. News 3307, 3308. The Antiqui-

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such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

49 U.S.C. § 1653(f).

20 *See* 36 C.F.R. § 800.3(c)(2).

21 *See Guiseppi v. Walling*, 144 F.2d 608, 623, 624 (2d Cir. 1944) (L. Hand, J., concurring), *aff'd sub nom. Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945); Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370, 382-84 (1947). *See also Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring).

22 L. Hand, *The Speech of Justice*, 29 Harv. L. Rev. 617, 620 (1916).

ties Act of 1906, 16 U.S.C. § 431 et seq., authorized the President to set aside national monuments on lands controlled by the United States.[23] The Historic Sites Act, 16 U.S.C. § 461, adopted in 1935, declared that "it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States" and established the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments. In 1949 Congress chartered the National Trust for Historic Preservation in the United States, a nonprofit corporation, "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest," and empowered it to accept and administer donated properties and funds. 16 U.S.C. § 468. And in 1965 Congress recognized that urban renewal projects might have an impact on historic sites because the Housing and Urban Development Act of that year permitted a project to relocate "within the project area a structure which the local public agency determines to be of historic value and which will be disposed of to a public body or a private nonprofit organization which will renovate and maintain such structure for historic purposes." Pub. L. No. 89-117, Title III, § 309(a), 79 Stat. 477 (1965) (prior to 1966 amendment). [24]

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23 The Antiquities Act of 1906 was a direct outgrowth of President Theodore Roosevelt's concern with and appreciation of the preservation of America's national heritage. W. Harbaugh, *Power and Responsibility: The Life and Times of Theodore Roosevelt* 331 (1961).

24 This policy carries over to the present. Title IV of the Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1781 (1970) (amending *inter alia* 42 U.S.C. § 1500 et seq.), provides for grants to preserve historic sites. Grants for historic preservation are also provided in Title I of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 et seq. We also note that the Internal Revenue Code provides some tax incentives for historic preservation. I.R.C. §§ 167(n) & (o), 191, 280B.

But it was not until a United States Conference of Mayors study by a special committee on historic preservation, entitled "With Heritage So Rich," that Congress, in enacting NHPA, took the key step of protecting not only "nationally significant" properties but also properties of "historical, architectural, or cultural significance at the community, State or regional level . . . against the force of the wrecking ball." H.R. Rep. No. 1916, *supra*, 1966 U.S. Code Cong. & Ad. News at 3309. The House Report emphasized the importance of focusing attention on the significance of such community, state or regional properties, specifically in "the urban renewal field," and of striking a "meaningful balance . . . between preservation of these important elements of our heritage and new construction . . . . " *Id.* The proposed NHPA had a threefold purpose, according to the House Report:

> (1) to strengthen and expand the work being done under section 2(b) of the act of August 21, 1935 . . . and to establish a national register of sites, structures, and the like which are significant in American history, architecture, archeology, and culture; (2) to encourage local, regional, State, and National interest in the protection of such properties; and (3) to establish an Advisory Council on Historic Preservation charged with the duties of advising the President and the Congress on matters relating to preservation of such properties, recommending measures to coordinate public and private preservation efforts, and reviewing plans for Federal undertakings and the undertakings of others involving Federal assistance or requiring a Federal license which affect sites, structures, and the like listed in the national register referred to above.

H.R. Rep. No. 1916, *supra*, 1966 U.S. Code Cong. & Ad. News at 3307-08.

The legislative history of § 106 begins with S. 3098, which Senator Edmund Muskie introduced on March 17, 1966. Section 202 of that bill provided:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted project in any State shall, prior to the approval of the expenditure of any Federal funds on the project, take into account the effect of the project on any site, building, or object of national significance that is included in the national register established under section 101(a) of this Act.

The executive branch secured the introduction of S. 3035 on March 2, 1966, but the bill contained no comparable provision. In a letter of June 7, 1966, to the Chairman of the Senate Committee on Interior and Insular Affairs, the Deputy Assistant Secretary of the Interior recommended that S. 3035 be enacted in lieu of S. 3098. He also recommended, however, the adoption of some of the provisions of S. 3098, including Section 202, suggesting that the section be expanded to include *all* structures of historic significance that are included on the national register, not simply structures of national significance.[25]

After brief hearings on the bills,[26] the Senate Committee on Interior and Insular Affairs reported out S. 3035 with

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25 *See* 1966 U.S. Code Cong. & Ad. News 3318-19, reproducing the virtually identical June 10, 1966, letter from the Deputy Assistant Secretary of the Interior to the Chairman of the *House* Committee on Interior and Insular Affairs concerning the House versions of S. 3035 and S. 3098.

26 During hearings on the two bills before the Senate Committee on Interior and Insular Affairs on June 8, 1966, Gordon Gray, Chairman of the National Trust for Historic Preservation, expressed his concern

amendments. Section 106 of the reported bill repeated the language "prior to the approval of the expenditure of any Federal funds on the project," expanded the protection to all historic properties, required the federal agency to report any effect on a listed property to the Advisory Council on Historic Preservation, and provided for a sixty-day waiting period, beginning at the time the report is made to the Advisory Council, "before Federal funds may be expended for the project concerned." [27] The Committee Report explained that Section 106 "is intended to insure that the Federal agencies will not work at cross purposes with the goals of historic preservation and provides for a meaningful review of Federal or federally assisted projects which affect historic properties identified on a national register." S. Rep. No. 1363, 89th Cong., 2d Sess. 8 (1966).[28] With

that national monuments be protected against demolition, mutilation or alteration without the approval of the proposed advisory board. When Gray was informed that Section 202 of S. 3098 responded to this concern, Gray perused the section and agreed, stating: "I think it meets my problem, Mr. Chairman, of making sure that Federal agencies do not destroy historic properties in their *ongoing activities*." Preservation of Historic Properties: Hearing on S. 3035 and S. 3098 before the Subcomm. on Parks and Recreation of the Senate Comm. on Interior and Insular Affairs, 89th Cong., 2d Sess. 24 (1966) (emphasis added).

27 Section 106 of the bill as reported provided in full:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted project in any State shall, prior to the approval of the expenditure of any Federal funds on the project, take into account the effect of the project on any district, site, building, structure, or object that is included in the National Register, and, if any such historical properties are affected, report such effect to the National Advisory Council on Historic Preservation established under title II of this Act for its consideration. There shall be a sixty-day waiting period, beginning on the date a report is made to the National Advisory Council on Historic Preservation, before Federal funds may be expended for the project concerned.

28 *See also* S. Rep. No. 1363, 89th Cong., 2d Sess. 10 (1966) (§ 106 requires federal agencies to report projects which affect historic properties to the Advisory Council "before *authorizing* the expenditure of Federal funds on the project" (emphasis added)).

little general discussion and no discussion of § 106, the Senate passed the bill on July 11, *see* 112 Cong. Rec. 15165-69 (1966), and referred it to the House Committee on Interior and Insular Affairs.

When the House Committee held hearings on July 15, the administration strongly objected to the waiting period requirement that the Senate Committee had added to the bill, reasoning: "A 60-day waiting period in these circumstances could seriously interfere with the execution of important Federal programs." Letter from Wilfred H. Rommel, Assistant Director for Legislative Reference, Bureau of the Budget, to Hon. Wayne N. Aspinall, Chairman, House Committee on Interior and Insular Affairs (July 15, 1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 3316. The House Committee accepted the administration's suggestion that the Advisory Council simply be afforded a "reasonable opportunity to comment" with regard to the project, changed the word "project" to "undertaking," [29] and expanded the protection of § 106 to federal licensing agencies. The section, as reported by the House Committee, is identical to § 106 of NHPA as enacted.

The House Committee Report contains some language that buttresses the strict cut-off interpretation of § 106. One of the responsibilities of the Advisory Council, the Report stated, was "~~reviewing~~ *plans* ~~for Federal undertak~~ings and the undertakings of ~~others~~," H.R. Rep. No. 1916, *supra*, 1966 U.S. Code Cong. & Ad. News 3308 (emphasis

29 The use of the term "undertaking" rather than "project" might suggest that § 106 applies to continuing activities. But we should not place too much emphasis on the unexplained change of one word in a statute; indeed, the change might simply suggest that § 106 applies to federal activities of any scope or kind.

added). The Report further explained that the bill "requires . . . agencies [whose undertakings affect listed properties] to afford the Advisory Council an ample, fair, and reasonable opportunity to comment with regard to such *proposed* undertakings *before they are commenced.*" *Id.*, 1966 U.S. Code Cong. & Ad. News 3310 (emphasis added). But although this "proposal" language demonstates a congressional commitment to delaying the initial federal funding of a program until the effect on listed properties has been assessed, it hardly demonstrates a converse commitment to rushing forward with the program once initial funding has been approved. Perhaps the legislative materials refer to "proposed" undertakings on the implicit assumption that a federal agency only has discretionary authority over the funding of a project once, at its inception. But sometimes, as here, the assumption is false.

The Committee also recognized that the bill represented a balance of goals, "an effort to establish the most effective preservation program possible at this time which is consistent with . . . the necessity for progress in our communities." *Id.*, 1966 U.S. Code Cong. & Ad. News 3309. On a more sensitive analysis, the legislative history reveals a determination to protect historic properties at every stage where the federal agency approves funding.

The House considered the bill on September 19 and October 10 and passed it by voice vote on the latter date. The Senate agreed to the House amendments on the following day without discussion, and the President signed the bill into law on October 15, 1966. Apparently the only floor debate in which § 106 was even mentioned occurred on October 10. Representative John Young, repeating the House Report's phrase, noted that the Advisory Council

had the responsibility of "reviewing plans for Federal undertakings . . . ." 112 Cong. Rec. 25938 (1966). Representative Leo O'Brien, after explaining that the first purpose of the bill was to provide federal funds for local preservation, stated: "Second, the program would be reinforced by providing that no Federal agency may make money available under other Federal programs, such as urban renewal, which will affect a historically significant structure until account has been taken of these effects and until opportunity has been given to the Advisory Council . . . to comment on the plan." 112 Cong. Rec. 25940 (1966). WURA contends that O'Brien's comment suggests that the accounting and notice requirements do not apply when "the federal money has already been appropriated." But we find the comment more ambiguous; indeed, the omission of any reference to "approval" and the emphasis on expenditures militate somewhat in favor of the view that the accounting and notice requirements do apply to each approval of funding in a continuing program.

Thus the direct legislative history of § 106 is inconclusive. Apparently Congress never explicitly considered the specific issue before us, whether "approval" and "undertaking" in § 106 should be interpreted as imposing that section's accounting and notice requirements on funding approvals that occur after an initial approval of funding for a continuing program.

WURA argues that the elimination of the sixty-day waiting period requirement indicates a congressional policy against delay once the agency has reviewed, and the Advisory Council has had the chance to review, the undertaking prior to the initial funding approval. But the actual policy might be more narrow—to forbid a fixed and substantial period of delay. Although our interpretation of

§ 106 does require more frequent agency reviews,[30] the reviews need not cause delay in the project if the agency acts with foresight.

We conclude that although Congress did not consider the narrow issue before us in 1966, it did intend in § 106 to provide "a meaningful review" of federally assisted projects which affect historic properties, S. Rep. No. 1363, *supra*. We believe that our interpretation of § 106 provides a far more meaningful review than the strict cut-off interpretation.

It is not without significance that the Advisory Committee itself came to interpret the Act as applying on a stage-by-stage basis. Note 9 *supra*. Generally speaking, an agency's own interpretation of an act that it is charged with executing is entitled to some weight, provided that the interpretation does not directly conflict with the intent of Congress.[31] An administrative construction is particu-

30 We recognize that insofar as our interpretation of § 106 requires agency review and notice to the Advisory Council whenever the agency approves the funding of any stage of a project, a project with many funding stages will require periodic reviews. But we do not believe that this "construction of the statute would place too great a burden on the urban renewal administrative process," *South Hill Neighborhood Ass'n*, *supra*, 421 F.2d at 462. Surely the courts would respect reasonable agency procedures for updating past reviews. Similar requirements under NEPA have not proved unworkable.

31 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction" (footnotes omitted)); *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965); *CAB v. Carefree Travel, Inc.*, 513 F.2d 375, 390 (2d Cir. 1975). *See also ITT World Communications, Inc. v. FCC*, Nos. 77-4028, 78-4047 (2d Cir. Mar. 22, 1979), slip op. 1861, 1884, *citing Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961), and *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933) (administrative practice "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion,

larly persuasive if Congress considers but fails to change it.[32] It is therefore interesting to review the legislative history of the 1976 amendments, Act of Sept. 28, 1976, Pub. L. No. 94-422, Title II, 90 Stat. 1320, for the history suggests both that Congress might have specifically considered the Advisory Council procedures just noted and that it generally approved of a broad interpretation of NHPA § 106.

The 1976 amendments greatly increased the federal funding of historic preservation, gave the Advisory Council on Historic Preservation independent agency status, and somewhat incidentally extended the protection of § 106 to eligible as well as listed properties. It may be significant that the Senate Report treated this extension as simply a "housekeeping" amendment, and hence of not overwhelming substantive importance. S. Rep. No. 94-367, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 2442, 2450. Such a characterization is consistent with our interpretation of § 106. For if "approval" of expenditures may occur in the several stages of a project, it is some-

of making the parts work efficiently and smoothly while they are yet untried and new.").

Concededly the Advisory Council procedures published at 36 C.F.R. § 800 are based on the authority of Executive Order 11593 and NEPA as well as NHPA. The administrative construction is nevertheless entitled to some weight in interpreting NHPA, for the Advisory Council's elaboration of "undertaking," "effect," and other terms of NHPA § 106 reveals an intent to define the scope of that statute's protections. Moreover, even the Council's 1972 procedures, adopted on the sole authority of NHPA, define "undertaking" broadly. 37 Fed. Reg. 24146 (1972).

HUD, of course, is also charged with administering NHPA, for it is the federal agency with jurisdiction over this urban renewal project under § 106. Although HUD has not officially adopted the Advisory Council procedures in 36 C.F.R. § 800, it has proposed to do so. Thus HUD's inaction in no way contradicts the Council's interpretation of the statute.

32 *See Udall v. Tallman*, *supra*, 380 U.S. at 17-18.

what less important whether a property is included or eligible. Even if the property must be included on the Register before § 106 applies, a phase-by-phase interpretation ensures that the impact on many eligible properties will be considered once they are listed.

Appended to the Senate Report were two reports of the Advisory Council on Historic Preservation. The first noted the importance of adequate funding for inventory and explained that "[w]hen resources are not identified until late in project planning, or when there are insufficient funds to develop a feasible and prudent preservation plan, then historic resources are lost to so-called progress." Advisory Council Report on S. 327, *supra* note 5, 1976 U.S. Code Cong. & Ad. News 2454, 2455.[33]

The second Advisory Council report indicated that since 1966 the National Environmental Policy Act of 1969 and Executive Order 11593 had "expanded the Council's review responsibilities, conducted pursuant to the Council's procedures (36 C.F.R. 800), to include properties that are eligible for inclusion in the National Register" and therefore pointed out that amendment of Section 106 to protect eligible properties "would clarify and support the council's present project review activities." Advisory Council Report on NHPA, *supra* note 1, 1976 U.S. Code Cong. & Ad. News 2458, 2461.[34] The Senate Report's appending of these

33 The 1846 railroad terminal in Salem, Massachusetts, one of the first such stations in the country, was, the Advisory Council's report noted, "demolished before its significance was recognized." Advisory Council Report on S. 327, *supra* note 5, 1976 U.S. Code Cong. & Ad. News 2455.

34 The House Conference Report accepted the Senate five-year funding authorization and, without discussion, recommended approval of the Senate provisions recognizing the Advisory Council as an independent agency and making "all of the necessary changes in the National Historic Preservation Act of 1966 to accomplish this purpose . . . ."

Advisory Council reports suggests that Congress was aware of the Council's regulations but chose not to change them.

The sum and substance of all this is, we think, a congressional purpose, expanding over the years, to make certain that federal agencies give weight to the impact of their activities on historic preservation. Throughout Congress has recognized that it is necessary to identify the properties that are of state, community, or local significance, and this was one of the major purposes of the 1966 Act itself. The problems of identification were and remain considerable, as the 1976 legislative history recognizes. One would suppose that Congress, having these problems in mind, did not intend to adopt a strict cut-off date, at least as to grant and loan contracts such as this one where the federal agency gives its final approval to the expenditure of federal funds only in stages. And § 108(B) of the contract explains that one of the purposes of phased approval is to ensure that the local agency does not take any step which, in HUD's opinion, might violate federal law.

Such an interpretation of NHPA is entirely consistent with the regulations of the Advisory Council, the agency charged by NHPA to act; with Executive Order 11593; and with NEPA. The regulations we have already described. The Executive Order, promulgated in 1971, directed federal agencies, in consultation with the Advisory Council, to "institute procedures to assure that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures and objects of historical, architectural or archaeological significance." 36 Fed. Reg. 8921 (May 15, 1971), 1971 U.S. Code Cong. &

H. Conf. Rep. No. 94-1468, 94th Cong., 2d Sess. 19, 1976 U.S. Code Cong. & Ad. News 2462, 2466. The Report contains no other more direct reference to the amendment to § 106.

Ad. News 2545. And NEPA, as we have pointed out, *supra* note 12, explicitly includes historic preservation as an environmental objective and imposes a continuing responsibility of compliance.

We are not persuaded by the cases, *supra* note 8, which have interpreted Section 106 of NHPA as imposing a "cut-off." None of the cases carefully considered the distinction between initial approval and additional approvals in an ongoing undertaking. Nor is there any indication that either Congress or the Advisory Council believes that these cases supply a binding interpretation. Certainly the Advisory Council regulations, *supra* note 9, do not so indicate. And there is no reference in the legislative history of the 1976 amendments to the decided cases in the lower federal courts, *supra* note 8. Thus it would be very difficult to argue that Congress by silence adopted any judicial interpretation of the cut-off rule.[35]

Moreover, the mandate of NHPA as enacted in 1966 is quite broad, 16 U.S.C. § 470. We are no more willing to give a "crabbed interpretation" to Section 106 of the Act than the courts have been in respect to NEPA. *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109, 1117 (D.C. Cir. 1971); *see Chelsea Neighborhood Associations v. United States Postal Service*, 516 F.2d 378, 385 (2d Cir. 1975); *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir.) *(Hanly I), cert. denied*, 409 U.S. 990 (1972); *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412, 419-20 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *see also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 131

35 *See Boys Markets, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235, 241-42 (1970) (absent "persuasive circumstances evidencing a clear design" that congressional inaction amounts to acceptance of a judicial rule, the mere silence of Congress is not a sufficient reason for refusing to reconsider the rule).

(1978) (recognizing that the promotion of the general public welfare by historic preservation in the form of landmarks regulation is a legitimate exercise of the state police power and holding that such regulation is not necessarily an unlawful taking requiring the award of compensation); *United States v. Gettysburg Electric Railway*, 160 U.S. 668, 682-83 (1896). We conclude that Section 106 as amended applies to require HUD and Advisory Council review as long as HUD retains the authority to make funding approvals pursuant to the grant and loan contract.

Here, there is no question that HUD had not approved all stages of the funding in 1976, when the amendment to § 106 requiring consideration of *eligible* properties became effective, or in 1978, when the Keeper of the National Register determined that the H. H. Peck carriage house was eligible. Nor is there any question that HUD did not comply with § 106 if it was applicable, for even after the "freeze," HUD did not consider the effect of the project on the carriage house and did not solicit the Advisory Council's advice. We therefore hold that HUD's conduct violated § 106 of NHPA.

B. *NEPA*

Our views with respect to NEPA accord with those of Judge Clarie,[36] which we need not repeat at length here.

36 We do note, however, that the district court slightly overstated the procedural obligations established by *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972) (*Hanly II*), *cert. denied*, 412 U.S. 908 (1973). *Hanly II* did not, as the court suggested, require a federal agency to conduct a public hearing before making its threshold determination as to whether an environmental impact statement was required. But although we did not require "a full-fledged formal hearing" in every case, we did hold that the agency "must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision." *Id.* at 836.

We think that his decision accords with how the other federal courts have interpreted NEPA. *Hart v. Denver Urban Renewal Authority,* 551 F.2d 1178 (10th Cir. 1977); *Jones v. Lynn,* 477 F.2d 885, 888-90 (1st Cir. 1973); *Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323, 1330-32 (4th Cir.), *cert. denied,* 409 U.S. 1000 (1972); *Committee to Save the South Green v. Hills,* No. H-76-328 (D. Conn. Nov. 5, 1976), 7 Envt'l L. Rep. 20061; *Save the Courthouse Committee v. Lynn,* 408 F. Supp. 1323, 1340 (S.D.N.Y. 1975); *Boston Waterfront Residents Association v. Romney,* 343 F. Supp. 89 (D. Mass. 1972). Our own cases very clearly make NEPA applicable to the quality of life in the urban setting. *City of Rochester v. United States Postal Service, supra,* 541 F.2d at 973; *Chelsea Neighborhood Associations v. United States Postal Service, supra; Hanly v. Mitchell, supra,* 460 F.2d at 647.

C. *Other Questions*

Under our construction of NHPA, the other arguments of the parties are essentially mooted. WATCH's arguments pertaining to HUD regulations and Advisory Council procedures are gratuitous. The premise of WURA's arguments relative to NEPA, *viz.,* that NHPA is inapplicable, is false; thus its arguments based on the supposed conflict must fail.

Judgment affirmed. In accordance with the stipulation of the parties, we direct that the injunction be made permanent and that defendants be enjoined from the demolition of buildings scheduled therefor until defendants have complied with the requirements of NHPA and NEPA.

LUMBARD, *Circuit Judge* (concurring):

I concur in making permanent the injunction granted by Chief Judge Clarie for the reasons stated in his succinct and thorough opinion, reported at —— F.2d ——. As HUD's failure to file an environmental impact statement violated NEPA, I see no reason to consider the contentions of the parties with respect to NHPA.

Supreme Court, U. S.
FILED
OCT 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 79-461

WATERBURY URBAN RENEWAL AGENCY,
Petitioner

vs.

WATERBURY ACTION TO CONSERVE OUR HERITAGE INC., ET AL
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendix B

EDITOR'S NOTE

Pages 1 + 2 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H78-539

WATCH (Waterbury Action to Conserve Our Heritage Incorporated)

—vs—

PATRICIA ROBERTS HARRIS, individually and as Secretary, United States Department of Housing and Urban Development; EDWARD T. MARTIN, Regional Administrator, Region 1, United States Department of Housing and Urban Development; LAWRENCE THOMPSON, Area Director, United States Department of Housing and Urban Development; WATERBURY URBAN RENEWAL AGENCY.

RULING ON MOTION FOR PRELIMINARY INJUNCTION

The plaintiff has moved for a preliminary injunction to restrain the defendants from proceeding with an urban renewal project in the City of Waterbury. The plaintiff claims that the defendants have failed to comply with the procedures mandated by the National Historic Preservation Act of 1966, 16 U.S.C. § 470 **et seq.** ("NHPA"), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 **et seq.** ("NEPA"). The Court finds that the plaintiff is likely to prevail on its claim that the defendants have failed to comply with the statutory mandates of NEPA, but that it is unlikely to prevail on its NHPA claim. The Court thus concludes that the plaintiff has made an adequate showing of probable success on the merits of the action and irreparable injury; accordingly, the plaintiff's motion for a preliminary injunction is granted.

Jurisdiction

This Court has subject matter jurisdiction over this controversy pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Absent " 'clear and convincing evidence' " of a contrary legislative intent, said Act renders federal agency action reviewable by a federal district court. **Abbot Laboratories v. Gardner,** 387 U.S. 136, 141 (1967); **Citizens Committee for the Hudson Valley v. Volpe,** 425 F.2d 97, 101 (2d Cir. 1970), **cert. den.** 400 U.S. 949 (1970). Neither the NHPA nor NEPA affirmatively precludes judicial review, and this Court will therefore follow those courts which have relied upon the Administrative Procedure Act as a basis for subject matter jurisdiction, where a federal agency's action is alleged to be in conflict with the statutory provisions of NHPA or NEPA. **See, e.g., Committee to Save the South Green v. Hills,** Civil No. H-76-328 (D. Conn. Nov. 5, 1976); **Save the Courthouse Committee v. Lynn, 408 F.Supp. 1323, 1331 (S.D.N.Y. 1975);** Scherr **v. Volpe,** 336 F.Supp. 882, 884-85 (W.D. Wisconsin 1971), **aff'd** 466 F.2d 1027 (7th Cir. 1972).

Jurisdiction also exists under 28 U.S.C. § 1331(a). The issues involved — the applicability of federal statutes and regulations — clearly present federal questions. With respect to the $10,000 jurisdictional amount, it is difficult, if not impossible, to assign a precise value to the plaintiff's interest in the preservation of structures of purported cultural and historical significance. In an analagous situation the Supreme Court declared:

> "The considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in § 1331(a)." **Illinois v. City of Milwaukee,** 406 U.S. 91, 98 (1972).

That same analysis applies here. **See Committee to Save the South Green v. Hills, supra; Save the Courthouse Committee v. Lynn, supra.**

Statement of Facts

The plaintiff, Waterbury Action to Conserve Our Heritage, Inc., is a nonstock corporation organized and existing under the laws of the State of Connecticut. Most of the members of the organization reside, are employed or own real property in Waterbury, Connecticut. The stated purpose of the organization is the promotion of historic and cultural preservation programs in the City of Waterbury. The defendants include three officials of the United States Department of Housing and Urban Development, who are responsible for executing the federal urban renewal and planning laws with respect to the project which is the subject of this action. These three defendants — Patricia Roberts Harris, Secretary of the Department, Edward T. Martin, Regional Administrator of the Department's Region 1, and Lawrence Thompson, the Department's Area Director for the Connecticut Area — will be referred to in this opinion as "HUD." The fourth defendant is the Waterbury Urban Renewal Agency ("the agency"), which is entrusted with implementing the urban renewal project at the local level.

In 1971 the City of Waterbury adopted an Urban Renewal Plan, known as the Central Business District Renewal Project No. Conn. R-107 ("the plan"), which envisioned the rehabilitation of 20.6 acres in downtown Waterbury. Said plan called for the demolition of 83 of the 113 buildings situated in the project area. Demolition commenced in 1971, and called for the construction of high rise, high density commercial and office space. As of the date of the hearing on the present motion, 56 buildings had been demolished. Twenty seven additional buildings remain to be demolished, according to the plan.[1]

On May 11, 1973, the local agency entered into a Loan and Capital Grant Contract with HUD, which provided for loans aggregating $12,844,451.00 and a grant of $11,544,451.00 from HUD to the agency for the purpose of implementing the plan.

Discussion of the Law

Standing.

The question before this Court at the present time is not whether any buildings within the project area are deserving of preservation; that decision is reserved to the informed discretion of the appropriate government agencies. Rather, the critical issue is whether the manner in which the government agencies exercised their discretion conformed with the requirements of federal law.

Before reaching that issue, however, the Court must address two threshold issues: (1) whether the plaintiff has standing and (2) whether the plaintiff is barred by laches. The defendants have conceded that the plaintiff has standing to maintain this action. Other courts in this Circuit have previously concluded that plaintiffs who live, work or own property in the area of an urban renewal project do meet the two fold "injury in fact" and "zone of interests" standing test enunciated in **Association of Data Processing Service Organizations, Inc. v. Camp,** 397 U.S. 150 (1970). **See Committee to Save the South Green v. Hills, supra; Save the Courthouse Committee v. Lynn, supra.** The Court therefore finds that the present plaintiff does have standing to maintain this suit.

Laches.

The defendants further contend that the equitable doctrine of laches should bar this suit. They note that the project was initially approved by the city's Board of Aldermen in October of 1971, after a public hearing on the project. Additionally, when HUD published the "Hanly" notice on January 5, 1977, requesting that any comments relative to the project be made prior to January 20, 1977, no adverse comments were received. Members of the plaintiff organization expressed no concern over the project until December 27, 1977. At that time Mr. and Mrs. Lorry Yelding requested that HUD determine whether any buildings within the project area were eligible for inclusion on the National Register of Historic Places. The defendants contend that this sequence of events clearly demon-

strates that the members of the plaintiff organization have slept on their rights, and that it would be unfair to enjoin further demolition at this time, in light of the fact that 56 buildings have already been demolished.

The courts have stated time and again that laches will not ordinarily bar an action which is brought to enforce environmental legislation. **Committee to Save the South Green v. Hills, supra; Save the Courthouse Committee v. Lynn, supra,** 408 F.Supp. at 1333; **City of Rochester v. United States Postal Service,** 541 F.2d 967, 977 (2d Cir. 1976); **Jones v. Lynn,** 477 F.2d 885, 892 (1st Cir. 1973). One reason for relaxing the traditional laches rules in environmental cases is that citizens are entitled to assume that government officials will follow the procedures mandated by the law.[2] As Judge Friendly has noted:

> "The tardiness of the parties in raising the issue cannot excuse compliance with NEPA; primary responsibility under the Act rests with the Agency." **City of New York v. United States,** 337 F.Supp. 150, 160 (E.D. N.Y. 1972) (three judge court).

That the plaintiff's delay, in and of itself, is not sufficient to bar suit is demonstrated by **Save the Courthouse Committee v. Lynn, supra.** In that case demolition of the courthouse was first considered in 1954 and the actual plan calling for demolition was approved in 1965. The court enjoined the demolition when suit was brought in 1975, in spite of the fact that the plaintiff had raised no objection to the project until 1974, nine years after the plan had been approved. This ruling was based on the principle that, in view of the strong public interest in effecting compliance with environmental legislation, "the primary question is not how much earlier plaintiffs should have sued, but whether injunctive relief pending compliance would still serve the public interest and the purposes of the Act." **Steubing v. Brinegar,** 511 F.2d 489, 495 (2d Cir. 1975).

In the context of the present case, it is true that 56 buildings have already been torn down and destroyed; however,

the purposes of NEPA would still be served by enjoining further demolition pending a properly conducted determination of whether the remaining 27 buildings merit preservation. This is not a situation where construction has proceeded to the point where it would be economically impractical to alter the original plan. **Compare City of Rochester v. United States Postal Service,** 541 F.2d 967, 977 (2d Cir. 1976), (where the court was "reluctantly forced to conclude" that laches would bar suit where the post office in question was 35% completed). The present case is more akin to **Committee to Save the South Green v. Hills, supra,** where the court enjoined further work on a highway, in spite of the fact that construction had already commenced, because the historical structure in question was still standing. This Court, recognizing that 27 buildings remain intact at the present time, concludes that laches is no bar to this suit.

Applicability of NHPA.

The National Historic Preservation Act of 1966 provides federal support for the preservation of the nation's historic landmarks. To accomplish this goal, the Act sets up the National Register of Historic Places and establishes an Advisory Council on Historic Preservation. Section 470f of the Act directs the head of any federal agency, which has jurisdiction over a proposed federally-assisted project, to consider the effect of any such project on any structure or object that is listed in the National Register. Additionally the federal agency head is to provide the Advisory Council on Historic Preservation an opportunity to comment on any such project.

The defendants do not dispute the allegation that they have not complied with the procedures mandated by NHPA. Rather they contend that the Act is not applicable to this case. To understand this argument, it is necessary to trace the development of § 470f. On May 11, 1973, the date the Loan and Capital Grant Contract was executed by HUD and the agency, that section read, in pertinent part:

> "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking, . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register . . . "

In 1976 the section was amended to insert the words "or eligible for inclusion in" following "included in." The effect of this change was to expand the scope of the Act's coverage, so that federal agency heads must now take into consideration not only buildings which are **included in** the National Register, but also those which are **eligible for inclusion.**

The parties agree that at the time the Loan and Capital Grant Contract was executed, no buildings within the project area were listed in the National Register. Thus, the Act imposed no duties on HUD as of that time. However, on February 7, 1978 the Keeper of the National Register determined that the H.H. Peck Carriage House, which is located within the project area, was eligible for inclusion in the National Register. Additionally on March 22, 1978 John Shannahan, the State Historic Preservation Officer, sent a letter to Lawrence Thompson, Area Director of HUD, in which he expressed the belief that several portions of the project area are Register eligible. The question to be decided therefore is whether the 1976 amendment to § 470f imposes any present duties on HUD, in light to these new circumstances.

The courts have determined that the cut off date for determining compliance with the NHPA, in the context of urban renewal projects, is the date the Loan and Capital Grant Contract is executed. This conclusion is based on the language of the statute, which requires that any determination regarding NHPA protected property is to be made "prior to the approval of the expenditure of any federal funds on the undertaking." The courts have universally held that the "approval of the expenditure" of federal funds occurs when the Loan and Capital Grant Contract is signed. **Committee to Save the**

South Green v. Hills, supra: Save the Courthouse Committee v. Lynn, supra, 408 F.Supp. at 1335; **Kent County Council for Historic Preservation v. Romney,** 304 F.Supp. 885, 888 (W.D. Mich. 1969); **St. Joseph Historical Society v. Land Clearance for Redevelopment Authority,** 366 F.Supp. 605, 609 (W.D. Mo. 1973); **South Hill Neighborhood Association v. Romney,** 421 F.2d 454, 462 (6th Cir. 1969), **cert. den.** 397 U.S. 1025 (1970).

Based on this interpretation of the statutory language, the courts have held that NHPA does not impose any new duties on federal agency heads, even when circumstances change after the signing of the Loan and Capital Grant Contract. Thus, under the pre-1976 law, NHPA was held inapplicable to a project if no buildings were listed in the National Register at the time of signing the Loan and Capital Grant Contract, in spite of the fact that buildings within the project area were subsequently listed in the National Register. **Committee to Save the South Green v. Hills, supra; Save the Courthouse Committee v. Lynn,** 408 F.Supp. at 1336; **South Hill Neighborhood Association v. Romney, supra,** 421 F.2d at 462; **Hart v. Denver Urban Renewal Authority,** 551 F.2d 1178, 1180 (10th Cir. 1977). Although no case has addressed the precise issue involved here, logic dictates that the same result should obtain in the present case. Whether there is a change in circumstances or a change in the law, the final cut off date for determining compliance with the NHPA is still the date of execution of the Loan and Capital Grant Contract. Since the Act imposed no duties on HUD at that time, there is no duty to comply with the Act now.

The plaintiff contends that even though the provisions of the Act themselves do not mandate compliance, the administrative regulations promulgated under the Act do. On May 15, 1971 the President promulgated Executive Order No. 11,593, in order to implement the goals and policies of the NHPA. Section 1(3) of the Order directs federal agencies to adopt procedures "to assure that Federal plans and programs contribute to the preservation and enhancement" of the nation's historic and cultural resources. Rather than enacting its own

regulations, HUD merely incorporated by reference the guidelines which had been published by the Advisory Council. **See** HUD Handbook of Departmental Policies 1390.1 (38 Fed. Reg. 19182, 19185).

The Advisory Council Guidelines, which are collected at 36 C.F.R. § 800, differ from NHPA in two important respects. First, even prior to the 1976 amendment to § 470f, the Guidelines directed that the federal agency consider the effect of any proposed undertaking on properties "that are included in **or eligible for inclusion** in the National Register." 36 C.F.R. § 800.4 (emphasis supplied). Second, the Guidelines mandate continuing compliance with the Act, even after the date of signing the Loan and Capital Grant Contract, as long as the federal agency retains any authority to make changes in the project which could alter its impact on historical and cultural properties. 36 C.F.R. § 800.3(c) and (g).

These Guidelines are inapplicable here for two reasons. First, the regulations did not require the federal agency to consider properties which are eligible for inclusion in the National Register until January 25, 1974, and the final date for determining compliance with NHPA was May 11, 1973; thus the adoption of this regulation subsequent to that date has no applicability in this case. Second, even if the regulation were in effect as of the date of signing the Loan and Capital Grant Contract, the regulation is invalid. It is axiomatic that "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." **United States v. Larinoff,** 431 U.S. 864, 873 (1977). A regulation which creates "a rule out of harmony with the statute, is a mere nullity." **Manhattan General Equip. Co. v. Commissioner,** 297 U.S. 129, 134 (1936). To the extent that the Advisory Council Guidelines expand the scope of the statute to include properties which are **eligible for inclusion** in the National Register and extend the cut off date for determining compliance beyond the date of signing the Loan and Capital Grant Contract, they are inconsistent with the statute and are therefore invalid.[8]

Applicability of NEPA.

The National Environmental Policy Act of 1969 has as its goal the restoration and maintenance of the natural environment. The principal mechanism for achieving this goal is contained in 42 U.S.C. § 4332(2) which provides in pertinent part:

> "(2) all agencies of the Federal Government shall —
>
> . . . .
>
> (c) include in every recommendation or report on proposals for legislation or other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
>
> (i) the environmental impact of the proposed action,
>
> . . . .
>
> (ii) alternatives to the proposed action.
>
> . . . .
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved . . . . "

Thus the core of NEPA is the environmental impact statement in which the federal agency, prior to initiating any major action which could significantly alter the environment, assesses the effect which the proposed action will have on the environment, including a discussion of alternatives which could minimize that effect.

NEPA complements NHPA insofar as it expressly extends its procedural protections to the nation's historic and cultural resources:

> "in order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, . . . to the end that the Nation may—
>
> . . . .
>
> (4) preserve important historic, cultural, and natural heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice." 42 U.S.C. § 4331.

The courts have construed this language to require the filing of an environmental impact statement if the proposed urban renewal project contemplates the destruction of properties listed in the National Register. **Committee to Save the South Green, supra; Hart v. Denver Urban Renewal Authority, supra,** 551 F.2d at 1182.

No environmental impact statement was ever prepared by HUD in the present case. HUD claims that an environmental impact statement is not necessary, because it made a "threshold determination" that the project will not significantly affect the environment. The finding of no significant environmental impact was made in a Special Environmental Clearance Report dated January 28, 1977. Therefore Philip Forzley, the Area Environmental Clearance Officer who prepared the report, could not have taken into consideration either the February 7, 1978 determination that the H.H. Peck Carriage House is eligible for inclusion in the National Register or the March 22, 1978 letter of the State Historic Preservation Officer stating his opinion that several other portions of the project area are eligible for inclusion in the National Register.

In contrast to NHPA, NEPA provides no set cut off date for determining whether compliance must be had. Rather, it requires compliance with its procedures at the time "any major Federal action" is taken. 42 U.S.C. § 4332. The courts have construed this language to mean that NEPA must be complied with as long as the federal agency retains significant control over the project. **Save the Courthouse Committee v.**

Lynn, supra, 408 F.Supp. at 1340; **Monroe County Conservation Council, Inc. v. Volpe,** 472 F.2d 693, 699 (2d Cir. 1972); **Jones v. Lynn, supra,** 477 F.2d at 889. In the context of urban renewal contracts, it has been held that HUD retains significant control over the project even after the signing of the Loan and Capital Grant Contract. The contract by its terms envisions continuing federal responsibility for the undertaking. Thus § 108 of Part II of the Loan and Capital Grant Contract requires the local agency to submit all proposed actions throughout the life of the contract to the Secretary of HUD for approval. Specifically, the Contract requires HUD approval of the acquisition or demolition of any property. The granting of such approval by the Secretary of HUD has been held to constitute "major federal action" within the meaning of 42 U.S.C. § 4332. Consequently the Secretary must comply with NEPA each time approval to proceed with a new aspect of the project is given. **Committee to Save the South Green v. Hills, supra; Save the Courthouse Committee v. Lynn, supra,** 408 F.Supp. at 1340; **Hart v. Denver Urban Renewal Authority, supra,** 551 F.2d at 1182.

HUD's recognition of its continuing responsibility for the present project is manifested in the freeze of the project which was ordered by HUD in January 1978, after questions were raised with respect to the historical value of buildings within the project area. HUD lifted this freeze on August 31, 1978, without conducting a further environmental review in light of the February 7, 1978 determination that the H.H. Peck Carriage House is eligible for inclusion in the National Register and the March 22, 1978 letter of the State Historic Preservation Officer in which he stated his opinion that several portions of the project area are Register eligible. Since NEPA envisions continuing compliance for so long as the federal agency has significant control over the project, the failure of HUD to make a new assessment of environmental consequences in light of this new information constitutes a violation of the Act. **See Committee to Save the South Green v. Hills, supra; Hart v. Denver Urban Renewal Authority, supra,** 551 F.2d at 1182.

The plaintiff, in order to prevail on a motion for preliminary injunction, does not have to prove that any structures are actually listed in the National Register at the time the injunction is sought. Thus in **Boston Waterfront Residents Association, Inc. v. Romney,** 343 F.Supp. 89 (D. Mass. 1972), a preliminary injunction was granted when it was shown that HUD had filed no environmental impact statement in spite of the fact that certain buildings within the project area had been "proposed for listing" in the National Register. Similarly, in **Aluli v. Brown,** 437 F.Supp. 602 (D. Hawaii 1977), the court enjoyed the Navy's use of Kahoolawe Island for target practice after a showing that archeological teams had discovered within the target area 89 archeological sites "which they believe meet the criteria for placement on the National Register." 437 F.Supp. at 608. In the latter case the Navy had orginally filed an environmental impact statement in 1972, at which time no archeological sites had been uncovered. The court ruled that, even though the initial environmental impact statement was proper, the NEPA's continuing duty of compliance required the Navy to make a new environmental impact statement once the new information was brought to its attention.

The conclusion that HUD must consider new evidence as it is made available should come as no surprise to the present defendants. The Special Environmental Clearance Report, in which NEPA was determined inapplicable to the R-107 project, concluded as follows:

> "This finding of Inapplicability shall be updated by addendum upon receipt of additional information having significant implications for environmental impact and not previously considered. A new finding shall then be required."

Moreover, in his letter of January 18, 1978 to Frank Davino, executive director of the Waterbury Urban Renewal Agency, in which the freeze was imposed, Daniel Kolesar, another HUD official, expressly acknowledged HUD's continuing duty of compliance with NEPA. (Plaintiff's Exhibit 4).

Upon being informed in February and March, 1978, by the Keeper of the National Register and the State Historic Preservation Officer, that structures within the project area may be eligible for inclusion in the National Register, HUD should have conducted a new "threshold determination" as to whether an environmental impact statement was required in light of this new information, before proceeding further with the project. If, as a result of this threshold determination, HUD decided that properties which were in fact Register eligible, would be affected by the project, then a detailed environmental impact statement would be required. **Hart v. Denver Urban Renewal Authority, supra,** 551 F.2d at 1182; **Committee to Save the South Green v. Hills, supra: Boston Waterfront Residents Association, Inc. v. Romny, supra** 343 F.Supp. at 90; **Aluli v. Brown, supra,** 437 F.Supp. at 606-07. Prior to making this threshold determination HUD must provide the public with an opportunity for a hearing and notice of such a hearing must be published. **Hanly v. Kleindienst,** 471 F.2d 823, 836 (2d Cir. 1972), **cert. den.** 412 U.S. 908 (1973). If HUD determines that none of the structures which are claimed to have historical value are in fact Register eligible or that they will not be adversely affected, then it must give sound reasons for that determination. **City of Rochester v. United States Postal Service, supra,** 541 F.2d at 973. Even in a threshold determination, the federal agency must provide an adequate record so that its finding of inapplicability of NEPA can be subjected to judicial review; "perfunctory and conclusory language simply does not suffice . . . " **Hanly v. Mitchell,** 460 F.2d 640, 647 (2d Cir. 1972), **cert. den. sub nom Hanly v. Kleindienst,** 409 U.S. 990 (1972). Finally, this threshold determination must consider possible alternatives to the project. **Hanly v. Kleindienst, supra,** 471 F.2d at 834-35.

Standard for Preliminary Injunction.

The prevailing standard for determining when a preliminary injunction should issue is set out in **Sonesta International Hotels Corp. v. Wellington Associates,** 483 F.2d 247 (2d Cir. 1973):

> "The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits **and** possible irreparable injury, **or** (2) sufficiently serious questions going to the merits to make them a fair ground of litigation **and** a balance of hardships tipping decidedly toward the party requesting the preliminary relief." **Id.** at 250 (emphasis in original).

From the discussion above, it is clear that the plaintiff has made a showing of probable success on the merits with respect to the allegation that HUD has not complied with their duties under the NEPA. Upon receipt of the information that structures within the project area were Register eligible, HUD should have conducted a new threshold determination as to whether an environmental impact statement was then required. It has been held that the failure of a federal agency to comply with NEPA is ordinarily in and of itself sufficient to justify preliminary injunctive relief. **City of Rochester v. United States Post Office,** 541 F.2d 967, 977 (2d Cir. 1976). The irreparable injury which would ensue if the injunction did not issue is obvious. The act of demolition is irreversible; once a building is razed, there will be no opportunity to assess its historical significance, nor will there be any possibility of considering alternatives to demolition. **See Save the Courthouse Committee v. Lynn, supra,** 408 F.Supp. at 1343.

HUD argues that the delay that will attend the issuance of the injunction will increase construction costs for the project and that certain developers already under contract may withdraw from the project if the plan is substantially altered. Similar claims in other cases have been held insufficient to warrant denial of preliminary relief. Courts have concluded that delay is not sufficient to outweigh the plaintiff's irreparable injury and the public's interest in securing compliance with NEPA. **Committee to Save the South Green v. Hills, supra; Citizens Defense Fund v. Gallagher,** No. Cv.-78-63-Bu (D. Montana Nov. 3, 1978). In **Save the Courthouse Committee v. Lynn, supra,** the injunction issued in spite of the defendants' claim that they would be damaged to the extent of one million dollars. As the Second Circuit has noted, compliance with

NEPA necessitates delay and its concomitant price increases, but Congress has deemed that preservation of the environment is worth that cost. **Steubing v. Brinegar, supra,** 511 F.2d at 497.

Security for Costs.

Rule 65(c), Fed. R. Civ. P., provides that the court, upon the issuance of a preliminary injunction, shall require a bond, in an amount which it deems appropriate, to cover costs incurred by any party who is wrongfully enjoined. The courts have held that a nominal bond is appropriate in environmental cases. **I-291 Why? Association v. Burns,** 372 F.Supp. 223, 264 (D. Conn. 1974), **aff'd** 517 F.2d 1077 (2d Cir. 1975) ($100 bond required); **Committee to Save the South Green v. Hills, supra** (no bond required); **Sierra Club v. Froehlke,** 359 F.Supp. 1289, 1385 (C.D. Cal. 1973) ($100 bond required). Accordingly an injunction will issue upon the filing of a $100 bond by the plaintiff.

Conclusion

While the plaintiff has failed to demonstrate a likelihood of success that the defendants have violated NHPA, it has shown a probability of success on its claim that HUD has failed to comply with NEPA. The fact that structures which are eligible for inclusion on the National Register are scheduled for demolition constitutes irreparable injury. Therefore a preliminary injunction will enter in favor of the plaintiff, restraining HUD and the local agency from proceeding further with this urban renewal project, until there has been a final hearing on the merits.[4]

The foregoing opinion shall constitute the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a).

SO ORDERED.

Dated at Hartford, Connecticut, this 22nd day of December, 1978.

T. Emmet Clarie
Chief Judge

FOOTNOTES

[1]/ The record is not clear as to the precise number of buildings which are scheduled for demolition under the plan. The defendant alleges that it is 83, while the plaintiff claims it is 104. Similarly, there is a dispute over the number of buildings which remain to be demolished at the present time. The defendant claims it is 27 and the plaintiff alleges it is 24. Since the same principles of law would apply irrespective of which numbers are used, the Court finds it unnecessary to resolve this issue of fact.

[2]/ The facts of the present case indicate that at least a portion of the delay in bringing suit was due to the plaintiff's reliance on government officials performing their duties in the appropriate manner. In response to the Yeldings' letter of December 27, 1977, HUD ordered a "freeze" on the project pending consideration of the historical value of the buildings within the project area. The freeze was lifted on August 31, 1978 and demolition recommenced on September 10, 1978. The plaintiff filed suit on October 12, 1978.

[3]/ Although both **Committee to Save the South Green v. Hills** and **Save the Courthouse Committee v. Lynn, supra,** applied the regulations which this Court now holds to be invalid, neither case is directly apposite here. In both cases the properties in question were either listed in or nominated to the National Register. By contrast, no properties within the project area in the present case have been listed in or nominated to the National Register. More importantly, it is clear from reading those two cases that the disparities between the statute and the regulations were never brought to the courts' attention; thus the courts never considered whether the regulations were valid.

It should be noted that, in light of the 1976 amendment to § 470f, the regulation's expansion of coverage to include properties which are eligible for inclusion in the National Register is no longer objectionable, as applied to projects where the Loan and Capital Grant Contract is executed subsequent to the effective date of the amendment. However, the provision which requires a continuing duty of compliance with NHPA is still inconsistent with the statute.

[4]/ There is no doubt that an injunction may issue against a local agency which has become a "partner" of the federal government in the implementation of a project. **Biderman v. Morton,** 497 F.2d 1141, 1147 (2d Cir. 1974); **Proetta v. Dent,** 484 F.2d 1146, 1148 (2d Cir. 1973).

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-461

WATERBURY URBAN RENEWAL AGENCY,

Petitioner,

v.

WATERBURY ACTION TO CONSERVE OUR HERITAGE, INCORPORATED

Respondent

ON PETITION FOR A WRIT ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondent, Waterbury Action to Conserve Our Heritage, Incorporated ("WATCH"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's opinion in this case. That opinion is reported at 603 F.2d 310.

Question Presented

Petitioner does not accurately set forth the question presented. The actual question presented is:

Whether the U.S. Department of Housing and Urban Development must continue to comply with the National Historic Preservation Act where it has retained significant control to make additional approvals with respect to a federally sponsored urban renewal project.

Statute Involved

The petition involves Section 106 of the National Historic Preservation Act ("NHPA") as amended in 1976, P.L. 94-422, Title II, § 201 (3), 90 Stat. 1320, which provides as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Sections 470i to 470n of this title a reasonable opportunity to comment with regard to such undertaking.

STATEMENT OF THE CASE

The Respondent is in general agreement with Petitioner's statement of the case. However, the following should be added for completeness.

Section II of the Loan and Capital Grant Contract mandates that the Urban Renewal Project not include any undertaking unless previously approved by the Secretary of HUD as "being in conformity with the approved application for the federal financial aid . . . . the Urban Renewal Plan, the applicable provisions of Title I [of the Housing Act], and the applicable provisions of this Contract." The contract lists as permissible undertakings:

> "(b) Demolition and removal by the Local Public Agency of buildings and improvements on Project Land; . . .
> (j) Relocating within or outside the project area of structures which will be restored and maintained for architectural or historic purposes; and
> (k) Restoration of acquired properties of historic or architectural value."

Under Sec. 108(A) of the Contract the Agency is required to promptly submit to HUD all data covering any proposed action of the Agency pertaining to the project. The acquisition of properties, the demolition of buildings and the approval of redevelopment projects and developers all require HUD's permission. This permission is necessary under Sec. 108(B) of the Contract to insure that the "Agency shall not take any step which might in the opinion of the Secretary [of HUD], violate applicable Federal laws or regulations."

The Agency has spent only $12,000,000 of the total cost of the project. None of the real estate represented by the remaining buildings scheduled for demolition has been disposed of by the Agency, or is under an agreement requiring conveyance. Any sale or disposition of the property represented by the buildings scheduled for demolition will require the approval of HUD. A substantial number of the remaining buildings scheduled for demolition are occupied by tenants of the Agency. The buildings scheduled for demolition were acquired between five and three years ago.

The buildings in the Project Area are of a classic turn-of-the-century main street type. The architecture of the area represents a collection of types such as Renaissance revival, Richardsonian romanesque, Greek revival, and Italianate. The area is an extremely good example of the period of its construction because such period was very ecclectic. The variety of styles, in addition to reflecting the architectural electicism of the time and place, reflects the variety of uses

dominate in the area during the period of construction and thus reflects the history, particularly the commercial history of Waterbury. The Project Area shows an evolution of uses and architectural styles having a significant effect on the development of the local culture.

On January 5, 1977, the Agency completed and forwarded to HUD's area office in Hartford, Connecticut, HUD Form ECO-1, Applicant's Environmental Information with respect to the Project Area. In the ECO-1, the Agency determined that "There are no known significant historic, archeological or architectural sites or properties listed on, or being considered for nomination to, the National Register of Historic Places." No further consideration of historical or architectural matters was made in the ECO-1. On January 21, 1977, HUD completed a Special Environmental Clearance for the R-107 Project, in which it was observed that "there are no properties listed or nominated to the National Register of Historical Places." No further consideration of historical or architectural matters was made in the Special Environmental Clearance. On January 25, 1977, HUD made a finding of inapplicability, stating there was no significant environmental impact with respect to the R-107 Project, and determined that the processing of the Project could proceed. The Environmental Clearance Officer in the HUD Area Office made no determination as to whether any structures in the Project Area were eligible for inclusion in the National Register of Historic Places. Prior to preparing the Special Environmental Clearance, the HUD Environmental Clearance Officer did not consult with the State Historic Preservation Officer ("SHPO") to determine if there were buildings or areas within the Project Area which might be eligible for inclusion in the National Register.

The ECO-1 did not consider alternatives to demolition of buildings designated for demolition in the Project Area. The special Environmental Clearance did not consider alternatives to demolition of buildings designated for demolition in the Project Area. HUD did not prepare an Environmental Impact Statement for the Project Area and did not consult with the National Advisory Council on Historic Preservation with respect to the Project Area.

The H. H. Peck Carriage House (Carriage House) is located in the Project Area. In a letter dated December 1, 1976, the Waterbury Commission on Aging suggested to SHPO that the Carriage House be considered for listing on the National Register. On March 3, 1977, the Connecticut Review Board for the National Register approved the Carriage House for study in anticipation of nomination to the National Register. On December 29, 1977, HUD requested from the Department of the Interior a determination of whether the Carriage House was eligible for inclusion in the National Register and on February 7, 1978, the Keeper of the National Register, Department of the Interior, determined the Carriage House was eligible for the National Register.

In December, 1977, attorneys for members of WATCH wrote to HUD's area office in Hartford demanding that National Register eligibility determinations be made with respect to the buildings in the Project Area. On January 18, 1978, HUD's area office informed WURA that additional information had been taken into consideration since the Special Environmental Review of January 28, 1977, and ordered a freeze, i.e., that no Federally assisted acquisition, disposition, renovation, or demolition be conducted on any structure in the Project Area without contact with the area office so that Register eligibility determinations could be made prior to any action being taken. The Advisory Council on Historic Preservation on January 23, 1978, informed the HUD area office that the Advisory Council had become aware of the R-107 Project, and requested that HUD evaluate the significance of the Central Business District and

inform the Advisory Council of HUD's findings. SHPO, in March, 1978, wrote to the HUD area office noting he had received documents from the Agency concerning the buildings in the Project Area, and had made a field trip to the Project Area on February 16, 1978. Based upon these SHPO concluded several portions of the Project Area were eligible for inclusion in the National Register. SHPO noted the area was substantially intact, one of the more complete old downtown areas, and a significant example of the type, and recommended that HUD seek a determination of eligibility for the area.

During the period January, 1978, through September, 1978, HUD was undertaking procedures to determine if properties in the Project Area were eligible for inclusion in the National Register, through the process of viewing the project, consultation with SHPO and relevant agencies, and gathering data. In August, 1978, HUD ordered that the Freeze be lifted. In September, 1978, HUD terminated all activity to seek Register eligibility determinations with respect to properties in the Project Area. On or about September 10, 1978, WURA recommenced demolition in the Project Area. On September 20, 1978, the SHPO sent a mailgram to Richard Fleming, Deputy Assistant Secretary of HUD, confirming that SHPO was not consulted in connection with the catch-up environmental review for the R-107 Project and suggested an immediate review of HUD's decision not to seek a determination of eligibility for the National Register.

WATCH brought this action on October 12, 1978, seeking, *inter alia*, a preliminary injunction. On December 22, 1979, the District Court held that the National Environmental Policy Act ("NEPA") was applicable but that, because the Loan and Capital Grant Contract was executed before any affected properties were listed in the National Register, NHPA was not. The Court also held that subsequent regulations of the Advisory Council on Historic Preservation

could not apply because they would be "inconsistent" with NHPA, the underlying statute. Accordingly, the Court granted WATCH's motion for a preliminary injunction to restrain the defendants from proceeding with the Project.

WURA appealed from the grant of the preliminary injunction. In a cross-appeal and pursuant to certification of the issue under 28 U.S.C. § 1292 (b), WATCH urged that NHPA was applicable to the Project. HUD does not appeal the grant of the injunction.

The parties stipulated that the decision of the District Court would be considered a hearing on the merits. The Second Circuit, on June 25, 1979, affirmed the District Court's issuance of an injunction on NEPA and further decided that NHPA also applies.

Reasons Why the Writ Should Be Denied

I

No true conflict exists between the decision of the Second Circuit in this matter and other Courts of Appeal.

The District Court decided that Section 106 of NHPA, 16 U.S.C. § 470f (hereinafter Section 106) did not apply in this case to require that HUD consult with the Advisory Council. The provision was amended in 1976 to add the words "or eligible for inclusion in," after the words "that is included in." P.L. 94-422, Title II, § 201(3), 90 Stat. 1320. This amendment was enacted while the Project was still ongoing but prior to the Special Environmental Clearance by HUD in January, 1977.

The District Court found that as of the date of the Loan and Capital Grant Contract, May 11, 1973, there were no properties in the Project Area included in the National Register. The date of the execution of the Contract was determined to be the cut-off date for the application of Section 106, and at that time Section 106 did not include the language applying the statute to Register-eligible properties.

The notion of a cut-off date for statute is based upon the view that "approval of the expenditure" in an urban renewal project takes place when the grant-loan contract is executed. Cases supporting this view are: *Kent County Council for Historic Preservation* v. *Romney*, 304 F. Supp. 885; 888 (W.D. Mich. 1969); *St. Joseph Historical Society* v. *Land Clear-ance for Redevelopment Authority*, 366 F. Supp. 605, 609 (W.D. Mo. 1973); *South Hill Neighborhood Association* v. *Romney*, 421 F.2d 454, 462 (6th Cir. 1969), *cert. den.* 397 U.S. 1025 (1970). Indeed, only one case, *Kent County*, is the source of this narrow construction of Section 106. *South Hill* and *St. Joseph Historical Society* reiterate the *Kent County* arguments. Subsequent cases invoking the cut-off principal have relied upon these cases without examination. *Hart* v. *Denver Urban Renewal Authority*, 551 F.2d 1178, 1180 (10th Cir. 1977); *Save the Courthouse* v. *Lynn*, 408 F. Supp. 1323, 1335 (S.D. N.Y. 1975); *Committee to Save the South Green* v. *Hills*, No. H-76-328 (D. Conn. Nov. 5, 1976) 7 ELR 20061, 20064.

Since *Kent County* is the underlying case for the cut-off date principal, the case should be closely examined. There the urban renewal project in question had been certified as completed by the Federal authorities. 304 F. Supp. at 887. The facts show that a decision for the plaintiffs would have resulted in a substantial quantum of damages to third parties. The District Court, in *Kent County*, based its interpretation of Section 106 on "common sense alone", and not on any examination of law, and legislative history, as was done by the Second Circuit in this case. See 304 F. Supp. at 888. In any event the case was decided on procedural grounds. The Court in *Kent County* determined that the plaintiffs' complaint did not in fact raise a reviewable issue of administrative conduct. 304 F. Supp. at 889. Additionally, the Court decided the plaintiffs lacked standing to sue under Section 106. The substantive conclusions of the Court in *Kent County* as to Section 106 are very gratuitous dicta.

South Hill Neighborhood Association v. *Romney*, 421 F.2d 454 (6th Cir. 1969) is not an opinion of the Sixth Circuit. The decision was a per curiam affirmance of a District Court decision. The District Court decision was "attached" to the Court of Appeals decision. The Sixth Circuit decision is no more than this:

> It is here determined that the District Court properly dissolve the Temporary Restraining Order previously entered by it, overruled the plaintiffs' Motion for a Temporary Injunction and sustained the defendants' Motion to Dismiss and dismissed the complaint as amended, and it is further here determined that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and that therefore the motion to affirm is well taken and should be sustained.

The District Court opinion in *South Hill* rests on a finding that the plaintiffs' did not have standing to sue. As with *Kent County*, the Court's treatment of Section 106 is dicta, and not at all well considered or examined.

The Sixth Circuit in *South Hill* did not specifically adopt the District Court opinion as its own. Since the plaintiffs never got beyond the threshold of standing, a consideration of other issues was not necessary. At most the Sixth Circuit decision means that Court of Appeals did not have to address the Section 106 question because, in its view, the District Court, at the time, correctly determined the plaintiffs did not have standing. Surely, if it had been found that plaintiffs had standing, the Sixth Circuit would not have ignored its duty to review the application of a new and significant Federal statute.

Such summary decision should be accorded little or no precedental weight. "Because a summary affirmance is an affirmance of the judgment only, the rationale of the

affirmance may not be gleaned soley from the opinion below." *Mandel* v. *Bradley*, 432 U.S. 173, 176, 53 L. Ed. 2d 199, 204 97 S. Ct. 2238 (1977). The decision of the Sixth Circuit does not meet the recognized standards of *stare decisis*. 20 Am Jur 2d, Courts, § 189. The emerging practice in the Federal system is to accord little weight to summary opinions because they provide a shaky guide to a full dress consideration of the issues at a later time. 1B Moore's Federal Practice § 0.402 [2] (1978-79 Supp. at p. 13-14); Anno., 45 L. Ed. 2d 791, § 5 (1976).

As Petitioner observes, the Tenth Circuit applied a contract cut-off date on the basis that "The use of the contract date as the time at which this provision [Section 106] becomes effective has been established in other jurisdictions." 551 F. 2d at 1180. However, the foregoing analysis of *Kent County* and subsequent cases shows that the contract date-cut-off principal was not established in any jurisdiction by any sound application of principal of *stare decisis*. Consequently, the Second Circuit was judicially unfettered as it approached Section 106.

Section 106 was amended in 1976. The amendment was subsequent to the *Kent County* line of cases. The force and effect of the amendment was material to the construction of Section 106 made by the Second Circuit. 603 F.2d at 324-325. The 1976 amendments also gave the Advisory Council specific power to promulgate regulations. 16 U.S.C. § 470s. The regulations of the Advisory Council encompassed Register eligible buildings and applied to ongoing Federal activity. 36 C.F.R. Part 800. Accordingly, the Second Circuit was dealing with a statutory scheme which had been altered since the *Kent County* line of cases.

There is no real conflict between circuits in this matter. The only possible conflict is between the Second Circuit decision and District Court decision of questionable validity.

II

This petition for certiorari does not raise questions of Federal law so substantial as to require review by the United States Supreme Court.

The principal defendant in this case is the Federal government. This defendant did not pursue this case in the District Court. Attached are memoranda filed by the Federal government in the District Court. On appeal the Federal government filed a brief opposing Petitioner's contentions concerning the National Environmental Policy Act. The Solicitor General has not petitioned for certiorari on behalf of the Federal defendants. Petitioner was joined in this litigation as the partner or agent of the Federal government. *Save the Courthouse Committee* v. *Lynn*, 408 F. Supp. at 1344. Under these circumstances Petitioner cannot be viewed as representing any broad national public interest. Indeed, it is clear from Petitioner's argument under sub (B) on page 5 of the petition, the only claim of concern is with the particular project in Waterbury.

This case involves an urban renewal project. The Housing and Community Development Act of 1974, 42 U.S.C. § 5301 et seq., discontinued urban renewal except to wind up existing projects. Consequently, the issue presented is a non-recurring problem.

A pivotal factor in the case was the continuing authority retained by HUD under the urban renewal Loan and Capital Grant Contract. 603 F.2d at 313. Presumably the Federal government can eliminate continuing responsibility in the future by not retaining continuing authority.

The 1976 amendments to NHPA make clear the act applies to Register eligible properties and gives the Advisory Council clear rule making authority. Certainly, there will be less difficulty and delay in having new Federal programs comply with NHPA then in bringing existing urban renewal projects into compliance.

This issue must be regarded as academic or episodic and not worthy of Supreme Court review.

III.

Granting of the petition for certiorari and decision in favor of Petitioner on the issue raised would not provide Petitioner with any relief.

The injunction granted by the District Court rested solely on the grounds that the government failed to comply with NEPA. This determination was affirmed on appeal and failure to comply with NHPA was added as another basis for the injunction. The parties have stipulated that the District Court hearing should be regarded as a final hearing on the merits. The project is now permanently enjoined until both NEPA and NHPA have been complied with. Petitioner has raised only the NHPA issue.

Rule 23(c) of the Supreme Court Rules provides in relevant part as follows: "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." See also Rule 40(d) (2). A question not presented in the petition for certiorari is not properly before the Court for review. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 431 n.60, 52 L. Ed. 2d 396, 95 S. Ct. 1843 (1977).

NEPA requires that historical and cultural assets be considered in any environmental review. 42 U.S.C. § 4331(b) (4). Compliance with this statute requires virtually the same review as required by Section 106 of NHPA. Indeed, it is intended that both reviews be done on a coordinated basis. See the Advisory Council Regulations, 36 C.F.R. § 800.9. Accordingly, the Petitioner would get no meaningful relief even if this Court reversed the Second Circuit on the question presented. Since the Court of Appeals decision rests on dual and independent grounds, and Petitioner has raised only one of them, the petition ought be dismissed. *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 465 n.5, 8 L. Ed. 2d 39, 83 S. Ct. 913 (1962).

CONCLUSION

For these reasons this case is not a proper one for review by certiorari in the Supreme Court of the United States, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM HOWARD

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Middletown, Connecticut
Counsel for the Respondent
WATCH

Dated: Middletown, Connecticut
November 6, 1979

ADDENDUM

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

WATCH (Waterbury Action to:
Conserve Our Heritage, Inc.), :
Plaintiff, :

v. CIVIL NO. H-78-539

PATRICIA ROBERTS
HARRIS, :
ET. ALS.,

Defendants. :

FEDERAL DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff's Complaint alleges that defendants have failed to comply with the National Environmental Policy Act of 1969 ("NEPA"), the National Historic Preservation Act of 1966 ("NHPA"), Executive Order 11593, and regulations and guidelines promulgated pursuant thereto as they pertain to an urban renewal project in Waterbury, Connecticut (Project No. Conn. R-107). Plaintiff seeks to enjoin defendants from proceeding with the project until such time as compliance with the aforesaid statutory and regulatory provisions is achieved.

In ruling on preliminary injunction and dismissal motions in *Committee to Save the South Green* v. *Hills*, Civil No. H-76-328 (D. Conn. Nov. 5, 1976) (Blumenfeld, *J.*), the District Court held that since HUD had adopted by reference the regulations promulgated by the Advisory Council on

Historic Preservation to implement the NHPA, HUD was bound by the standards specified in those regulations. *See*, HUD Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality, (38 Fed. Reg. 19182 at 19185, July 18, 1973); 36 C.F.R. 800. The Loan and Capital Grant Contract for Conn. R-107 was executed by HUD and the Waterbury Urban Renewal Agency in 1973. However, the NEPA environmental review for this project was not performed until several years later; the special environmental clearance was issued by HUD on January 28, 1977.

The Advisory Council regulations in effect when the Loan and Grant Contract was executed in 1973, *see* 38 Fed. Reg. 5388 *et. seq.*, required only that consideration be given to the effect of federally financed activities upon properties listed on the National Register of Historic Places. These regulations were subsequently amended to additionally require identification of properties eligible for inclusion in the National Register and consideration of the effect of federally financed activities upon such properties. The amended Advisory Council regulations were in effect at the time the environmental review of this project was performed. It is HUD policy that the governing regulations are the applicable regulations in effect at the time that the NEPA environmental review is conducted. In performing the special environmental clearance for Conn. R-107, HUD did not take appropriate steps to identify properties eligible for inclusion on the National Register of Historic Places.

Since the District Court has held that HUD is bound by its regulations, which adopt by reference the Advisory Council procedures, HUD cannot respond further on the issues raised in this case. However, the Waterbury Urban Renewal Agency, the co-defendant responsible for undertaking and completing the project involved in this litigation, is the party most directly affected by any decision rendered;

the Agency, therefore, should be afforded a full opportunity to present all legal and equitable arguments available to it.

Respectfully submitted,
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United States Attorney

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WATCH (Waterbury Action to: Conserve Our Heritage, Inc.), :
Plaintiff, :

v. CIVIL NO. H-78-539

PATRICIA ROBERTS HARRIS, ET. ALS., :

Defendants. :

FEDERAL DEFENDANT'S
POST-HEARING MEMORANDUM

On July 18, 1973, the Department of Housing and Urban Development ("HUD") published in the Federal Register its Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality ("Handbook"), 38 Fed. Reg. 19182 *et. seq.* Section 5(a) (6) of that Handbook provides, in pertinent part:

> Any HUD action or undertaking which has an effect on a property listed on, or nominated to, the National Register of Historic Places will require Special Environmental Clearance and must comply with section 106 of the National Historic Preservation Act of 1966 and implementing procedures.

In 1973, when the Handbook was published, both section 106 of the NHPA, 16 U.S.C. §470(f), and the Advisory Council's implementing procedures, 36 C.F.R. §800.4, required consideration of a project's effect on properties included in the National Register. The HUD Handbook, therefore, was consonant with existing statutory and regulatory provisions.

In 1974, the Advisory Council's implementing procedures were amended to additionally require such consideration for properties eligible for inclusion in the National Register. In 1976, section 106 was broadened to conform to the implementing regulations by also requiring consideration of a project's effect on properties eligible for inclusion in the National Register. The HUD Handbook, although amended on June 11, 1976, 41 Fed. Reg. 23878, did not change section 5(a) (6). HUD has, however, considered its responsibilities to include the tri-partite consideration of a project's effect on properties listed on, nominated to, or eligible for inclusion in the National Register under an obligation emanating from the mandates of section 106 itself, from HUD's adoption of the Part 800 regulations, *see, Committee to Save The South Green* v. *Hills*, Civil No. H-76-328 (D.Conn. Nov. 5, 1976), as well as from an interpretation of the Handbook which incorporates statutory and regulatory changes. It is HUD policy that the governing requirements stem from the applicable statute and regulations in effect at the time the environmental review is conducted; in the instant case, the special environmental clearance was issued by HUD on January 28, 1977, which is subsequent to the amendment of the statute and regulations. At the hearing on plaintiff's motion for a preliminary injunction, the testimony of Philip Forzley, HUD's Environmental Clearance Officer, revealed that HUD did not take appropriate steps to identify properties eligible for inclusion in the National Register.

Respectfully submitted,

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United States Attorney

BY: S/ Diana Garfield

DIANA GARFIELD
Assistant United States Attorney

Supreme Court, U. S.
FILED
DEC 4 1979
MICHAEL RODAK, JR., CLERK

No. 79-461

In the Supreme Court of the United States

OCTOBER TERM, 1979

WATERBURY URBAN RENEWAL AGENCY, PETITIONER

v.

WATERBURY ACTION TO CONSERVE OUR HERITAGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 603 F.2d 310. The opinion of the district court (Pet. App. 3b-19b) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1979. The petition for a writ of certiorari was filed on September 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, after it has approved an urban renewal plan authorizing demolition of the structure in question, the Department of Housing and Urban Development has a continuing duty to comply with Section 106 of the National Historic Preservation Act when, in the loan and grant contract, the Department retains the right to object to demolitions.

STATEMENT

In 1971, the City of Waterbury, Connecticut, adopted an urban renewal plan, known as the Central Business District Renewal Project No. Conn. R-107, which established plans for the rehabilitation of 20.6 acres in downtown Waterbury (Pet. App. 5a-6a). On May 11, 1973, the Department of Housing and Urban Development entered into an urban renewal loan and grant contract with petitioner for the purpose of implementing the central business district renewal plan.[1] Under the terms of the loan and grant contract HUD may object to acquisitions, demolitions and changes in the Waterbury renewal plan. The purpose of this right to object is to insure that petitioner does not take any step which might, in the opinion of HUD, violate applicable federal laws or

[1] The loan and grant contract provides that HUD will give petitioner $12,844,451 in loans and $11,544,451 in a grant to carry out the project (Pet. App. 5b). At present only $12,000,000 has been spent. The project is far from complete; as of November 1978, 27 buildings remain to be demolished and some of the land has yet to be acquired (Pet. App. 6a).

regulations or provisions of the contract (Pet. App. 7a-9a n.4).[2]

The regulations set forth in HUD's Environmental Handbook, 1390.1 *et seq.*, 38 Fed. Reg. 19182, 19188 (1973),[3] provided that HUD prepare an environmental assessment before it authorized the loan and grant contract. This assessment is a single review procedure to meet the requirements of both the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*[4]

[2] Section 108(A) of the loan and grant contract requires petitioner to submit to HUD documentary data with respect to any of the above-cited actions that petitioner proposes to take in carrying out the project. The provision relating to HUD's right to object is set forth in Section 108(B) of the contract.

[3] HUD's Environmental Handbook has subsequently been amended at 39 Fed. Reg. 38922 (1974); 41 Fed. Reg. 23878 (1976); 42 Fed. Reg. 13208 (1977); 43 Fed. Reg. 797 (1978); 44 Fed. Reg. 12856 (1979).

[4] HUD's Handbook was also prepared in compliance with Exec. Order No. 11,593, 36 Fed. Reg. 8921 (1971), which mandated that federal agencies, in consultation with the Advisory Council on Historic Preservation, prepare procedures "to assure that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures, and objects of historical, architectural or archaeological significance." HUD did not adopt any regulations pursuant to Exec. Order No. 11,593; rather it incorporated by reference the regulations adopted by the Advisory Council. 36 C.F.R. 800.1 *et seq.* Recently, however, HUD amended its regulations to allow for the promulgation of its own historic preservation regulations. 44 Fed. Reg. 12856 (1979). Those regulations have not yet been promulgated.

Such an environmental assessment was undertaken in 1976. Based on the information HUD received from petitioner and others, HUD determined, on January 28, 1977, that the project could proceed without the preparation of a formal environmental impact statement. HUD also determined that, because no properties in the project area were listed or nominated for listing on the National Register of Historic Places, there was no need to consult with the Advisory Council on Historic Preservation. HUD did not examine whether any of the properties in the project area might be "eligible" for inclusion on the National Register (Pet. App. 10a-11a).[5]

On April 21, 1977, HUD was informed by petitioner that a certain carriage house in the Waterbury renewal district might be eligible for listing on the National Register. In response to a request by HUD, the Keeper of the National Register determined on February 7, 1978, that the house was eligible. In December 1977, respondent Waterbury Action to Conserve Our Heritage (WATCH) demanded that

[5] Prior to 1976, the NHPA required that federal agencies consult with the Advisory Council and consider historic preservation only when the undertaking involved property listed on the National Register of Historic Places. In 1976, the NHPA was amended to require that the same procedure be followed when the undertaking involved property "eligible" for listing on the National Register. Act of September 28, 1976, Pub. L. No. 94-422, 90 Stat. 1320. Since 1974, however, the Advisory Council on Historic Preservation regulations, and thus by reference HUD regulations, do require agencies to consider properties eligible for listing since 1974. 36 C.F.R. 800.1 *et seq.*

HUD make eligibility determinations with respect to all of the commercial properties in the project area.[6] HUD then ordered a "freeze" on all federally assisted demolitions until it could complete an eligibility review. Before completing the review, however, HUD lifted the "freeze" on August 31, 1978,[7] whereupon petitioner proceeded to make arrangements to demolish the remaining 27 buildings slated for demolition under the urban renewal plan (Pet. App. 11a-12a).

Respondent WATCH brought suit in October 1978, and on December 22, 1978, the district court granted a preliminary injunction (Pet. App. 12a). The court held that NHPA was inapplicable (Pet. App. 13a-14a), but that NEPA required HUD to reconsider its decision not to prepare an environmental impact statement in light of new information that several buildings in the project area were potentially eligible for inclusion on the National Register (Pet. App. 16a-17a). The court held that the decision point triggering the NHPA had passed at the funding approval stage in 1973 when the loan and grant contract was signed, but that HUD had an ongoing obligation under NEPA to review environmental consequences, including impact on historic buildings, for as long as HUD retained the discretionary authority to

[6] Similar requests were subsequently made by the Connecticut State Historic Preservation Office and the Advisory Council on Historic Preservation.

[7] The freeze was instituted unilaterally by the HUD Area Office and was lifted pursuant to a recommendation from HUD Headquarters.

object to petitioner's acquisition and demolition decisions, which the court found to be major federal actions within the meaning of 42 U.S.C. 4332.

Petitioner and respondent WATCH both appealed,[8] and the court of appeals affirmed the district court's decision with regard to NEPA, but reversed with regard to NHPA. The court of appeals concluded that HUD must comply with both NEPA and NHPA for so long as HUD retains a right to object to acquisitions and demolitions under Section 108 of the loan and grant contract (Pet. App. 35a). The court held that NHPA did not establish that the initial funding approval date serves as a cutoff date for further historic preservation review in cases where such right to object is retained by HUD (Pet. App. 34a).

The court directed that a permanent injunction be entered enjoining HUD and petitioner from demolishing any buildings until compliance with the requirements of NEPA and NHPA (Pet. App. 36a).

ARGUMENT

Petitioner contends that the court of appeals' failure to treat the date of approval of the loan and grant contract as a cutoff date for NHPA obligations is erroneous and in conflict with decisions in other courts of appeals.

1. Although there is contrary authority, the present case is not in direct conflict with any other court

[8] By stipulation the parties agreed to treat the hearing on the preliminary injunction as a hearing on the merits.

of appeals decision. In *South Hill Neighborhood Ass'n* v. *Romney*, 421 F.2d 454 (6th Cir. 1969), cert. denied, 397 U.S. 1025 (1970), the court of appeals affirmed per curiam the district court's decision that plaintiffs lacked standing. The opinion of the district court, including the dictum that the plaintiffs' claim would have failed even if they had standing because NHPA obligations were cut off after approval of the loan and grant contract, was printed as an appendix to the opinion of the court of appeals. In *Hart* v. *Denver Urban Renewal Authority*, 551 F.2d 1178, 1180 (10th Cir. 1977), the court found that NHPA was not violated because the loan and grant contract had been entered into before the building in question was placed on the National Register. This conclusion was dictum, however, because the court upheld the district court's injunction on the ground that NEPA required HUD to consider the historical significance of the building in accordance with its regulations. Moreover, as the court below pointed out (Pet. App. 14a n.8, 34a), the court in *Hart* did not focus on whether a right was retained to object to expenditures of funds subsequent to approval of the loan and grant contract, as it did here.

2. Moreover, a resolution of the issue presented by petitioner would be of limited significance in this case and might not be of substantial future importance.

When HUD's obligation under NHPA in this case arose in 1973, the statute required consideration only of properties listed on or nominated to the National

Register. In 1976, the statute was amended to also require consideration of properties "eligible" for listing on the National Register. Thus, in the future, consideration of all eligible properties at the time of entering into a loan and grant contract will likely obviate the occasion for reconsideration at later stages of a project.

In addition, resolution in petitioner's favor of the question presented would not result in a dissolution of the injunction. Both the district court and the court of appeals held that HUD did not fulfill its obligation under NEPA to consider the effect of the demolition on eligible properties. Petitioner does not challenge this holding. Thus, the injunction is supportable on a basis quite independent of the interpretation of NHPA that petitioner challenges.

Finally, HUD acknowledged in the district court that it had not adhered to the instruction in its Environmental Handbook to consider "eligible" properties and to consult with the Advisory Council before their demolition. Thus, apart from the possible effect of the 1976 statutory amendment, HUD was required to consider eligible properties in this case. See, *e.g.*, *Hart*, *supra*, 551 F.2d at 1182.[9] HUD is in the process of writing its own regulations concerning historic

[9] The court of appeals did not reach the question of the applicability of HUD's Environmental Handbook instruction. The district court found that the instruction, effective in 1974, was not applicable because the loan and grant contract was entered into in 1973 although the preservation review did not take place until 1976 (Pet. App. 11b).

preservation review, which may eliminate problems of the kind that arose in this case. Moreover, HUD is revising its outstanding loan and grant contracts to eliminate the provision that presently authorizes the Department to later object to specific actions of the grant recipients already approved in the contract.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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DECEMBER 1979

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IN THE

Supreme Court of the United States

October Term, 1978

No. 79461

WATERBURY URBAN RENEWAL AGENCY,
Petitioner

vs.

WATERBURY ACTION TO CONSERVE OUR HERITAGE, INCORPORATED
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

November 26, 1979

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IN THE

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WATERBURY URBAN RENEWAL AGENCY,
Petitioner

vs.

WATERBURY ACTION TO CONSERVE OUR HERITAGE, INCORPORATED
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR HE SECOND CIRCUIT

I.

REPLY TO RESPONDENT'S STATEMENT OF CASE.

On Page 3 of Respondent's Brief, it is stated:

> "Under Sec. 108(A) of the Contract the Agency is required to promptly submit to HUD all data covering any proposed action of the Agency pertaining to the project. The acquisition of properties, the demolition of buildings and the approval of redevelopment projects and developers all require HUD's permission. This permission is necessary under Sec. 108(B) of the Contract to insure that the 'Agency shall not take any step which might in the opinion of the Secretary [of HUD], violate applicable Federal laws or regulations.' "

An examination of Section 108 of the Loan and Capital Grant Contract indicates that this statement is inaccurate.

Section 108(A) only requires the agency to submit data to HUD if the Secretary requests such data.

> "(A) Types of Project Data To Be Furnished. — The Local Public Agency **will promptly furnish the Secretary with such copies as he may reasonably require**, for his use under this Contract, of the following items covering actions then proposed to be taken by the Local Public Agency in its carrying out of, and which pertain to, the Project:" (emphasis supplied)

Section 108(A)

Loan and Capital Grant Contract

Section 108(B) provides that the local agency, after furnishing any items covered by and in accordance with Section 108(A), may have requested payments withheld; however, this only can occur when the Secretary has requested the information in accordance with Section 108(A).

The record in this case is barren of any evidence indicating that the Secretary requested any data under Section 108(A) concerning demolition, relocation or restoration of properties, and as a matter of fact, data was not requested by the Secretary.

The applicability of Section 108(B) is predicated upon the condition precedent of a request by the Secretary for information. Since none was made in this case, the statements of the Respondent are misleading and inaccurate.

On Page 3 of the Respondent's Brief, Respondent describes the buildings in the area as of classic turn-of-the-century main street types, representing Renaissance revival, Richardsonian romanesque, etc. The question before the Federal District Court was not:

> "Whether any buildings within the project area are deserving of preservation . . . Rather, the critical issue is whether the manner in which the government agencies exercise their discretion conformed with the requirements of federal law."

U.S. District Court Decision
Page 5

The U.S. Court of Appeals for the Second Circuit also did not make any finding relative to the architectural significance of the buildings within the project area.

The inclusion by the Respondent of information relating to the architectural significance of the buildings within the project area is self-serving and improper.

The remaining facts appearing on Pages 4, 5, 6 and 7 of Respondent's Brief are totally inapposite to the issue to be decided by this Court, namely whether Section 106 of the National Historic Preservation Act is applicable after the execution of the Loan and Capital Grant Contract.

II.

A CONFLICT DOES EXIST BETWEEN THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS AND ALL OTHER REPORTED CASES.

The Respondent's contention that no true conflict exists between the Second Circuit's decision and the decision of the other Courts of Appeal is erroneous.

The Second Circuit specifically negated such a position when it stated on Page 3287 of its opinion that:

> "Because our conclusion differs from that of most Courts that have addressed the question, our reasoning must be stated with care."

The Respondent, in cavalier fashion, on Page 8 of its Brief describes cases invoking the cutoff principle as having been decided "without examination" of the legal issues involved. Specifically, the Respondent refers to **Hart v. Denver Urban Renewal Authority**, 551 F. 2d 1178 (1977); **Save the Courthouse Comm. v. Lynn**, 408 F. Supp. 1323 (1975); and **Committee to Save the South Green v. Hills**, 7 Envt'l L. Rep. 20061, and the decision of the Lower District Court in this case, which the Respondent euphemistically describes as of "questionable validity."

Such a contention by the Respondent amounts to nothing more than its own gratuitous conclusion. In fact, an examination of the above cases indicates that the courts addressed the "cut off date" issue in a clear and concise manner.

> "As we understand it, plaintiff's position is that each and every time there is to be an expenditure pursuant to a prior approval the entire approval machinery wheels must again be set in motion and the approval process repeated. This Court would have to be mad to place such a ludicrous interpretation on the simple clear language employed by Congress in § 470f."
>
> Kent County Council For Historic
> Preservation v. Romney
> 304 F. Supp. 885 (1969)

III.

THE PETITION DOES RAISE QUESTIONS OF FEDERAL LAW SO SUBSTANTIAL AS TO REQUIRE REVIEW BY THE UNITED STATES SUPREME COURT.

The Respondent inaccurately states that the issues in the case at bar only involve the viability of a particular project in Waterbury, Connecticut.

It is evident from the amicus curiae briefs on file with this Court from the Redevelopment Agency of the City and County of San Francisco and the Connecticut Community Development Association that this case involves questions of broad national concern. Futhermore, it is also evident that a decision in this case will have great impact on numerous urban renewal projects throughout the United States involving hundreds of millions of dollars.

The Respondent further argues that the issue presented is a non-recurring one.[1] Such a contention is also inaccurate since the paramount issue in this matter is whether Section 106 of the National Historic Preservation Act is applicable after "the approval of the expenditure of any federal funds on a federal undertaking."

IV.

A DECISION IN FAVOR OF PETITIONER ON THE ISSUE RAISED WOULD PROVIDE PETITIONER WITH RELIEF.

The Respondent states that because Petitioner has only raised the NHPA issue, a decision in its favor would not provide the Petitioner with any relief since the Petitioner would have to comply with the requirements of NEPA, which are substantially the same as NHPA.

The Petitioner raised the following points with reference to NEPA before the Court of Appeals for the Second Circuit:

(1) That in the event NHPA was inapplicable, NEPA was also inapplicable because it would be in conflict with

---

1/ It should be noted that the Community Development Act of 1974 provides that community and development funds can be allocated to urban renewal projects. 42 U.S.C., Section 5305 (a) (10).

the "cut off" requirement of Section 106 of NHPA under this Court's decision in **Flintridge Development Co. v. Scenic Rivers Association**, 426 U.S. 776 (1976);

(2) That the NHPA is the functional equivalent of NEPA, and therefore, NEPA is not applicable in this case; and

(3) That HUD followed its own regulations as approved by the Council on Environmental Quality, and therefore, its determination that an environmental impact statement was not required was not arbitrary or capricious, and was in full compliance with NEPA and satisfied the standard for agency action as set forth in **Hanly v. Kleindienst**, 471 F. 2d 823 (2d Cir. 1972).

The Court of Appeals for the Second Circuit specifically held "that HUD's conduct violated Section 106 of NHPA".

WURA v. WATCH, supra p. 3301

The Second Circuit further stated that:

"Under our construction of NHPA, the other arguments of the parties are essentially mooted. The premise of WURA's arguments relative to NEPA, viz, that NHPA is inapplicable, is false; this its arguments based on the supposed conflict must fail."

WURA v. WATCH
supra, P. 3302

In view of the reasoning of the Second Circuit Court of Appeals, it is Petitioner's position that if this Court should decide the NHPA issue in its favor, the proper procedure would be to remand this case for a decision on the NEPA issues that were not addressed by the Second Circuit Court of Appeals.

However, the Petitioner would also welcome this Court's ruling on the NEPA issues set forth supra. In the event certiorari is granted, the Petitioner will brief and argue the applicability of NEPA as well as NHPA.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully submits that this Petition for Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 27 1979
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

October Term, 1978

No. 79-461

WATERBURY URBAN RENEWAL AGENCY,
Petitioner

vs.

WATERBURY ACTION TO CONSERVE OUR HERITAGE,
Respondent

MOTION OF CONNECTICUT COMMUNITY DEVELOPMENT ASSOCIATION (CCDA) FOR LEAVE TO FILE A BRIEF AS AN AMICUS CURIAE IN SUPPORT OF THE WATERBURY URBAN RENEWAL AGENCY'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

For the reasons set forth in the attached brief Connecticut Community Development Association (CCDA) moves for leave to file said brief as an AMICUS CURIAE pursuant to the provisions of Rule 42 (1) of the Supreme Court Rules because consent to the filing of such a brief has been denied by the Respondent.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

October Term, 1978

No. 79-461

WATERBURY URBAN RENEWAL AGENCY,
Petitioner

vs.

WATERBURY ACTION TO CONSERVE OUR HERITAGE,
Respondent

AMICUS CURIAE BRIEF OF CONNECTICUT COMMUNITY DEVELOPMENT ASSOCIATION (CCDA) IN SUPPORT OF THE WATERBURY URBAN RENEWAL AGENCY'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF CCDA

The Connecticut Community Development Association (CCDA) is a state-wide, non-profit association organized and existing under Connecticut law to promote the interests of urban renewal and community development agencies and officials within the State of Connecticut. Its current members include, among others, the cities or towns of Enfield, New Britain, New Haven, Norwalk, Norwich and Stamford, and individual renewal and development officials from the Connecticut Cities and towns presently undertaking 27 Urban Renewal projects approved and financed by the Federal government under Title I of the Housing Act of 1949, as amended, 42 U.S.C., Sections 1450 et. seq. (Bridgeport, Bristol, Danbury, Enfield, Glastonbury, Hartford, Middletown, New Britain, New Haven, New London, Norwalk, Norwich, Stamford, Stratford, Waterbury, West Haven, Willimantic and Windsor Locks.)

Loan and capital grant contracts for the undertaking of the foregoing 27 Urban Renewal projects were executed either in the late 1960's or early 1970's. Approximately $130,000,000 in Federal funds is involved in implementing the foregoing Urban Renewal projects, in addition to approximately $66,000,000 in State and local funds. All of the foregoing Urban Renewal projects are being undertaken in cities and towns which are desperately in need of renewal and redevelopment. All of the foregoing Urban Renewal projects are being undertaken in accordance with Urban Renewal plans which were the subject of long planning processes and mandated public hearings by both redevelopment agencies and local legislative bodies under Chapter 130 of the Connecticut General Statutes (1958 Rev.), as amended. In almost all of the foregoing Urban Renewal projects, extensive work has been carried out to date to implement such projects, including the making of legal commitments to redevelopers to demolish or rehabilitate and reuse structures, sell or lease land and construct site improvements.

CCDA's member municipalities and individual members are also responsible for the planning and implementation of

Federally financed community developments programs authorized under Title I of the Housing and Community Development Act of 1974, as amended (42 U.S.C., Sections 5301 et seq.). In many of the above communities, community development funds are being allocated to the above Urban Renewal projects because community development funds may be used for completing Urban Renewal activities. 42 U.S.C., Section 5305(a)(10). In addition, the U.S. Department of Housing and Urban Development (HUD) may require a municipality to expand up to twenty percent (20%) of a municipality's annual community development allocation to complete Urban Renewal project activities. 42 U.S.C., Section 5312.

All of the foregoing Urban Renewal projects are being undertaken in the older parts of Connecticut's older municipalities. Almost all of the municipalities and redevelopment agencies are subject to suits brought by individuals who believe that these older areas should be maintained in "as is" conditions. Two lawsuits, in addition to the case at bar, have been instituted in the United States District Court for the District of Connecticut against the Middletown Redevelopment Agency, **Committee to Save the South Green v. Hills et. al.**, Civil Action No. H-76-328 (D. Conn., Nov. 5, 1976) and the New Haven Redevelopment Agency, **Committee to Save City Hall v. Harriss (SIC) et. al.**, Civil Action No. 77-300 (D. Conn., Aug. 15, 1977) to enjoin the implementation of two of the 27 Urban Renewal Projects described above, on essentially the same grounds as are present in the case at bar. The attorney for Respondent Waterbury Action to Conserve Our Heritage (WATCH) represented the plaintiffs in each of the aforementioned cases. Facts regarding the institution of those two actions together with the instant case have been widely reported in the press throughout the State of Connecticut.

ARGUMENT

Given the pattern to date, CCDA believes that the interests of its member municipalities and officials to carry out much needed Urban Renewal projects are threatened by the portion of the holding of the United States Court of Appeals for the Second Circuit stating that procedures mandated under Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C., Section 470f, (NHPA) continue to apply to an Urban Renewal project after execution of a loan and capital grant contract so long as the U.S. Department of Housing and Urban Development (HUD) retains authority to make funding approvals pursuant to a loan and capital grant contract. **Watch v. Harris et al.**, Docket Nos. 79-7030, 79-7100, (2d Cir., June 25, 1979) in the following respects:

1. Imposing upon CCDA's members, as well as HUD, the adminisratively impossible task of determining whether activities undertaken pursuant to an approved Urban Renewal Plan and loan and capital grant contract will have an effect upon any district, site, building, structure or object which may be eligible for inclusion in the National Register, or endangering Urban Renewal plans, to accommodate recently designated National Register districts, sites, buildings, structures or objects in order to comply with requirements imposed under 16 U.S.C., Section 1470f.

2. Forcing CCDA's members to delay implementing activities, including the carrying out of commitments to private redevelopers, authorized under an approved Urban Renewal plan and loan and capital grant contract until, if at all, a clear determination can be made that such activities will have no effect upon any district, site, building, structure or object which may be eligible for inclusion in the National Register.

3. Causing severe financial losses to Connecticut's cities and towns by potentially delaying the implementation of activities authorized under an approved Urban Renewal Plan

and loan and capital grant contract until inflation causes the cost of implementing those activities to exceed the amounts budgeted for those activities, without recourse to HUD for addiional funds due to the phasing out of the Urban Renewal program in 1974;

4. Discouraging potential investors from investing in Urban Renewal areas in Connecticut's cities and towns due to doubts about the abilities of municipalities, redevelopment agencies and municipal officials to implement authorized activities under legally approved Urban Renewal plans and loan and capital grant contracts.

5. Granting to small groups of self-appointed individuals and the Advisory Council on Historic Preservation superior rights to determine municipal development strategies beyond the powers of citizens in general by giving to such self-appointed individuals and the Advisory Council the power to stop at any time the implementation of Urban Renewal plans, which have been approved by locally elected and appointed officials, as well as HUD and agencies of the State of Connecticut, because of alleged impacts on "newly discovered" historic districts, sites, buildings, structures or objects.

Respondent argues that it makes no practical difference if the decision of the Court of Appeals for the Second Circuit is allowed to stand because the provisions of Section 102 of the National Environmental Policies Act of 1969, 42 U.S.C., Section 4332 (NEPA), will continue to apply. However, as shown above, the provisions of NHPA add an infinitely more complex and difficult regulatory process to the already difficult and complex regulatory process established under NEPA. In the first place, under NEPA, the Federal funding agency, HUD, is also the Federal agency which makes the determinations under NEPA. Therefore, local officials, including CCDA's members, can deal with one Federal agency which has the whole picture before it. NHPA, on the other hand, turns the regulatory process over to agencies, such as the Advisory

Council on Historic Preservation, which have no programmatic responsibilities pertaining to municipal redevelopment or the economic, social and physical well-being of Connecticut's cities and towns. Secondly, NEPA is a balancing act, i.e. requiring the use of an "interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which have an impact on man's environment." 42 U.S.C., Section 4332(A). NHPA, on the other hand, does not provide a balancing mechanism. Instead, it mandates certain time-consuming and difficult procedures for the purpose of serving one interest, namely historic preservation, irrespective of economic, social or physical consequences. Thirdly, NEPA procedures are required within certain specified time frames. For example, under HUD procedures, environmental assessments must be made prior to HUD approval of an Urban Renewal Plan, or an amendment thereto (HUD Handbook 1390.1), or with respect to the community development program at the time the municipality assumes responsibility for undertaking the environmental review. 42 U.S.C., Section 5304(h). NHPA, on the other hand, as interpreted by the United States Court of Appeals for the Second Circuit, has no time frames. Districts, sites, buildings, structures and objects can be declared eligible for inclusion in the National Register upon anyone's petition at any time. There are no cut-off dates or times when decisions can be made which clearly will not involve the application of NHPA. Therefore, while local officials can safely move ahead after complying with NEPA procedures, they are never immune from last minute NHPA imposed requirements.

CONCLUSION

For the foregoing reasons, CCDA respectfully requests that the Court grant WURA's petition for a Writ of Certiorari.

Respectfully Submitted

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